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Before the  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.

GENERAL COUNSEL  
OF COPYRIGHT

In the Matter of

Distribution of 1999, 2000 and 2001  
Digital Audio Recording Royalty Funds

Docket No. 2002-6 CARP DD 99-01

**DIRECT CASE OF BROADCAST MUSIC, INC., THE AMERICAN SOCIETY OF  
COMPOSERS, AUTHORS AND PUBLISHERS, SESAC, INC., THE HARRY  
FOX AGENCY, INC. AND THE SONGWRITERS GUILD OF AMERICA**

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January 15, 2003

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**I. INTRODUCTION**

Broadcast Music, Inc. ("BMI"), the American Society of Composers, Authors and Publishers ("ASCAP"), SESAC, Inc. ("SESAC"), The Harry Fox Agency, Inc. ("HFA") and The Songwriters Guild of America ("SGA") (collectively, the "Settling Parties") hereby submit their direct case in the above-captioned proceeding in accordance with the Copyright Office (the "Office") Order dated October 21, 2002 and 37 C.F.R. § 251.43. See Order in Docket No. 2002-6 CARP DD 99-01 (October 21, 2002) (the "Office's Order"); 37 C.F.R. § 251.43 (2002). This direct case establishes the Settling Parties' entitlement to royalties in the 1999, 2000 and 2001 Musical Works Funds, Writers Subfunds. As is detailed below, no controversy exists with respect to the 1999, 2000 and 2001 Musical Works Funds, Publishers Subfunds.

## **II. THE SETTling PARTIES' CLAIM OF ENTITLEMENT**

The Settling Parties, in compliance with 37 C.F.R. § 251.43(d) and the Office's Order, hereby state the following claims to royalties collected pursuant to the Audio Home Recording Act ("AHRA"), Pub. L. No. 102-563, 106 Stat. 4237 (1992).

1999 Musical Works Fund, Writers Subfund – 99.9995368%

1999 Musical Works Fund, Publishers Subfund – 100%

2000 Musical Works Fund, Writers Subfund – 99.9995474%

2000 Musical Works Fund, Publishers Subfund – 100%

2001 Musical Works Fund, Writers Subfund – 99.9995363%

2001 Musical Works Fund, Publishers Subfund – 100%

The Settling Parties reserve the right to amend their claims in light of the evidence presented by the only other claimant in this proceeding.

## **III. THE PARTIES TO THIS PROCEEDING**

### **A. The Settling Parties**

The Settling Parties represent all publishers and all songwriters save one claiming royalties in either the Writers or Publishers Subfunds of the Musical Works Funds for 1999, 2000 and 2001.<sup>1</sup> As organizations, BMI represents more than 300,000 songwriters, composers and music publishers and millions of musical works; ASCAP represents more than 130,000 composers, lyricists and music publishers and millions of music compositions; SESAC represents more than 5,000 songwriters and music publishers; HFA acts as licensing agent for over 27,000 music publishers, who in turn represent the interests of hundreds of thousands of songwriters; and SGA

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<sup>1</sup> The Settling Parties are pleased to report that they have reached settlements with the following parties: James Cannings d/b/a Our Own Performance Society, Copyright Management, Inc., Jacobson & Colfin, as agent for various writers and publishers, and Missing Link Music LLC.

represents more than 5,000 songwriters. BMI, ASCAP, SESAC and HFA also represent innumerable foreign songwriters and music publishers through agreements with foreign performing rights and mechanical rights organizations.

Lists of the individual songwriters and music publishers and affiliated foreign performing rights and mechanical rights organizations represented by each of the Settling Parties in this proceeding were submitted with their respective claims and are incorporated herein by reference.

**B. The Only Claimant Other Than the Settling Parties**

There is only one individual claimant who filed a claim to the Writers Subfunds of the Musical Works Funds for 1999, 2000 and/or 2001 and who filed a Notice of Intent to Participate in this proceeding, Alicia Carolyn Evelyn. Other than the Settling Parties, no party that filed a claim to the Publishers Subfunds of the Musical Work Funds for the years 1999, 2000 and 2001 filed a Notice of Intent to Participate in this proceeding.

**IV. RECORDS FROM PREVIOUS DISTRIBUTION PROCEEDINGS**

Pursuant to Section 251.43 of the Office regulations, 37 C.F.R. § 251.43, the Settling Parties hereby incorporate by reference their direct case from the two previous royalty distribution proceedings under the AHRA, including the complete testimony and exhibits presented therein by Ms. Alison Smith of BMI dated March 21, 1996 and November 8, 1999, Mr. Milt Laughlin of BMI dated November 5, 1999 and Mr. Michael Fine, then President and CEO of SoundScan, Inc. ("SoundScan"), dated March 20, 1996. In those two other proceedings, the CARP determined on the basis of paper proceedings, and the Librarian of Congress (the "Librarian") concurred, that the methodology for determining distribution of the Musical Works Funds as presented by the Settling Parties in their direct cases was "logical and consistent" and, accordingly, completely acceptable for

establishing resolution of de minimis individual claims.<sup>2</sup> See Librarian's Decision in Docket No. 95-1 CARP DD 92-94, 62 Fed. Reg. 6558, 6561 (February 12, 1997), attached as Appendix 5. See also Librarian's Decision in Docket No. 99-3 CARP DD 95-98, 66 Fed. Reg. 9360, 9363 (February 7, 2001), attached as Appendix 2; CARP Report in Docket No. 99-3 CARP DD 95-98, attached as Appendix 1; CARP Report in Docket No. 95-1 CARP DD 92-94, attached as Appendix 4.

The Librarian's decision in the first DART proceeding was upheld on appeal by the U.S. Court of Appeals for the D.C. Circuit.<sup>3</sup> See Curry v. Librarian of Congress, No. 97-1119 (D.C. Cir. November 4, 1998), petition for en banc review denied, No. 97-1119 (D.C. Cir. February 4, 1999), cert. denied sub nom. Cannings v. Librarian of Congress, 527 U.S. 1038, petition for reh'g of denial of cert. denied, 527 U.S. 1058 (1999) (finding nothing in petitioners' claims warranting modification or remand of the Librarian's orders on review), attached as Appendices 6, 7, 8 and 9. In the second DART proceeding, an appeal was docketed but withdrawn pursuant to Ms. Evelyn's own motion and the case was ultimately dismissed.<sup>4</sup> See Evelyn v. Librarian of Congress, No. 01-1117 (D.C. Cir. April 25, 2001), attached as Appendix 3.

#### V. BACKGROUND OF THIS PROCEEDING

By a notice dated July 11, 2002, 67 Fed. Reg. 46698 (July 16, 2002), the Office consolidated consideration of the distribution of 1999, 2000 and 2001 royalties collected pursuant to the AHRA. The notice also requested that comments on the existence of controversies and a notice

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<sup>2</sup> In the two previous distribution proceedings under the AHRA, covering a seven-year period from 1992 to 1998, Ms. Evelyn was found entitled to a *combined* total of \$1.15 (one dollar and fifteen cents) in royalties.

<sup>3</sup> Ms. Evelyn was an appellant in the first proceeding. The U.S. Department of Justice, which represented the Librarian in that case, filed for administrative costs against Ms. Evelyn and two other individual claimants. The court granted the Department's request against Ms. Evelyn. Curry v. Librarian of Congress, No. 97-1119 (D.C. Cir. February 18, 1999).

<sup>4</sup> Ms. Evelyn was the only appellant.

of intent to participate in the consolidated proceeding be filed with the Office by September 16, 2002. The Settling Parties complied with this request by filing their Notice of Intent to Participate and Comments on Controversy on September 16, 2002. Ms. Evelyn also timely filed a Notice of Intent to Participate and Comments on Controversies.

Although the Settling Parties have actively pursued settlement with Ms. Evelyn, a settlement has not been reached.

The Settling Parties filed a motion for partial distribution of the 1999, 2000 and 2001 on June 13, 2002, which motion was granted by the Office pursuant to its order dated December 3, 2002. See Order in Docket No. 2002-6 CARP DD 99-01 (December 3, 2002).

The Settling Parties are also submitting simultaneously herewith a Motion to Decide the Controversy on the Basis of Written Pleadings.

## **VI. STATUTORY CRITERIA FOR DISTRIBUTION**

The statutory criteria for allocation of royalty payments with respect to the Musical Works Fund are “the extent to which . . . each musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions.” 17 U.S.C. § 1006(c)(2) (2002). The testimony presented herewith in the Settling Parties’ direct case is based on one of the two alternative statutory criteria, namely the sales of musical recordings, an approach that has been deemed by the Librarian to be appropriate in royalty distribution proceedings for de minimis claims under the AHRA. See Librarian’s Decision in Docket No. 95-1 CARP DD 92-94, 62 Fed. Reg. 6558, 6561 (February 12, 1997) (noting that “the Panel acted properly in basing its determination solely on the evidence of record sales”); see also Librarian’s Decision in Docket No. 99-3 CARP DD 95-98, 66 Fed. Reg. 9360, 9362-9363 (February 7, 2001) (approving the same approach).

To calculate shares based on sales, the Settling Parties have relied on data from SoundScan, the neutral, third-party industry standard that tracks and compiles data on the sales of musical recordings in the United States. As in the past, the Settling Parties are not presenting performance data in their direct case in this proceeding because the cost of obtaining such data cannot be justified in light of the small amount of funds available for distribution and the even smaller amount of funds in controversy.

## VII. THE SETTling PARTIES' WITNESSES

The Settling Parties will present the following two witnesses who will sponsor the exhibits referenced in their testimony:

**Alison Smith**, Vice President, Performing Rights, BMI; and

**Milt Laughlin**, Vice President, Operations and Information Technology, BMI.

Based on Ms. Smith's and Mr. Laughlin's testimony regarding sales of sound recordings of the Settling Parties and of Ms. Evelyn during the period relevant to this proceeding, Ms. Evelyn should receive the following percentage awards of the Writers Subfunds:

Claimant	1999		2000		2001	
	Writers	Publishers	Writers	Publishers	Writers	Publishers
Alicia Carolyn Evelyn	.0004632%	N/A	.0004526%	N/A	.0004637%	N/A

## VIII. CONCLUSION

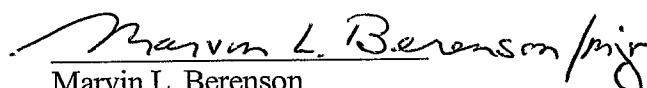
Based on Ms. Smith's additional testimony that the Settling Parties represent the publishers for all other copyrighted titles and the writers for virtually all other copyrighted titles, it mathematically follows that the Settling Parties should receive the remainder of the royalties collected in the 1999-2001 Musical Works Fund, *i.e.*, the percentages set forth in the Settling Parties' claim of entitlement presented herein. See Librarian's Decision in Docket No. 99-3 CARP



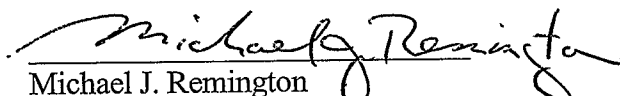
DD 95-98, 66 Fed. Reg. 9360, 9365 (February 7, 2001) (citing the CARP Panel's finding that it would be wasteful to require all claimants in a given distribution proceeding to prove entitlement through "the presentation of detailed data for every individual work"); see also Librarian's Decision in Docket No. 95-1 CARP DD 92-94, 62 Fed. Reg. 6558, 6561 (February 12, 1997) (approving of the CARP Panel's methodology, based on the mathematical concept that "the sum of the parts must equal the whole," to conclude that the Settling Parties share was equal to the total amount of the royalties in question minus the non-settling parties' shares).

Respectfully submitted,

**BROADCAST MUSIC, INC.**

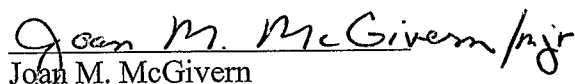


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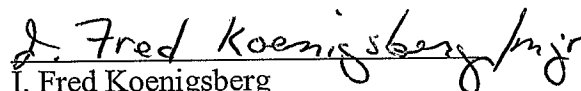


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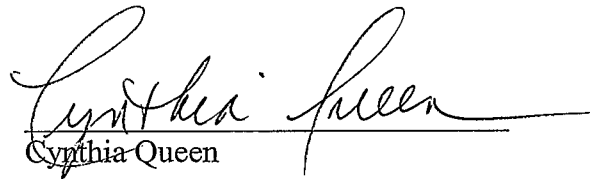
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January 15, 2003

### CERTIFICATE OF SERVICE

I, Cynthia Queen, hereby certify that on this 14th day of January, 2003, a copy of the foregoing Direct Case of Broadcast Music, Inc., the American Society of Composers, Authors and Publishers, SESAC, Inc., The Harry Fox Agency, Inc. and The Songwriters Guild of America was served by overnight courier (Federal Express) to the following:

Alicia Carolyn Evelyn  
10 Highland Avenue  
Binghamton, New York 13905

  
Cynthia Queen

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### TESTIMONY

<u>Witness</u>	<u>Tab</u>
Alison Smith	A
Milt Laughlin	B

### EXHIBITS

<u>Exhibit Number</u>	<u>Title or Description</u>	<u>Sponsoring Witness</u>
1	SoundScan Sales Statistics	Milt Laughlin
2	Alicia Carolyn Evelyn SoundScan Data	Milt Laughlin
3	Summary of Sales Figures and Percentages of Total Sales for Alicia Carolyn Evelyn By Year	Milt Laughlin

### APPENDICES

<u>Tab</u>	<u>Document</u>
1	Panel Decision, In the Matter of Distribution of DART Royalty Funds for 1995, 1996, 1997 and 1998, Docket No. 99-3 CARP DD 95-98 (Nov. 9, 2000)
2	Librarian of Congress Distribution Order for DART Royalty Funds for 1995, 1996, 1997 and 1998, 66 Fed. Reg. 9360 (Feb. 7, 2001)
3	<i>Evelyn v. Librarian of Congress</i> , No. 01-1117 (D.C. Cir. April 25, 2001); Ms. Evelyn's Motion for Voluntary Dismissal dated April 12, 2001
4	Panel Decision, In the Matter of Distribution of DART Royalty Funds for 1992, 1993 and 1994, Docket No. 95-1 CARP DD 92-94 (Dec. 16, 1996)
5	Librarian of Congress Distribution Order for DART Royalty Funds for 1992, 1993 and 1994, 62 Fed. Reg. 6558 (Feb. 3, 1997)
6	<i>Curry v. Librarian of Congress</i> , No. 97-1119 (D.C. Cir. Nov. 4, 1998)
7	<i>Curry v. Librarian of Congress</i> , No. 97-1119 (D.C. Cir. Feb. 4, 1999) (denial of petition for rehearing)

## APPENDICES (Con'd)

<u>Tab</u>	<u>Document</u>
8	<i>Cannings v. Librarian of Congress</i> , 527 U.S. 1038 (1999) (denial of petition for writ of certiorari)
9	<i>Cannings v. Librarian of Congress</i> , 527 U.S. 1058 (1999) (denial of petition for rehearing)

## **TESTIMONY OF ALISON SMITH**

### **Background**

1. My name is Alison Smith. I am Vice President, Performing Rights, of Broadcast Music, Inc. ("BMI"). My responsibilities include coordinating various aspects of BMI's royalty distribution systems. One of my major responsibilities is to communicate information regarding BMI's distribution procedures and policies to BMI personnel in all branch offices, as well as to BMI's many constituencies in the songwriter and publisher communities.

2. In October 1985, I joined BMI's performing rights staff in the Nashville office. In 1987, I relocated to the New York office as a member of the Writer/Publisher Relations Department. In August 1990, I was made Director, Performing Rights, and in August 1992, I became Senior Director, Performing Rights. In October 1994, I was named Assistant Vice President, Performing Rights, and in February 1996, I was named Vice President, Performing Rights. Prior to joining BMI, I received a BBA degree from Belmont University's School of Music Business in 1984.

3. For the past twelve years, my concentration within BMI has been in the area of royalty distributions for radio and television performances. In this capacity, I am familiar with those aspects of BMI's operations that monitor performances of music on radio and television stations, as well as broadcast and cable networks, and I am generally familiar with the music industry.

### **The Parties**

4. I am appearing today as a witness on behalf of BMI, the American Society of Composers, Authors and Publishers ("ASCAP"), SESAC, Inc., The Harry Fox Agency, Inc. (a subsidiary of the National Music Publishers' Association) and The Songwriters Guild of America (collectively, the "Settling Parties"). In the aggregate, the Settling Parties represent hundreds of

thousands of U.S. songwriters, composers and music publishers, as well as the songwriters, composers and music publishers of dozens of foreign performing rights organizations that have authorized the Settling Parties to act on their behalf in this proceeding.

5. The only other party in this proceeding is one individual claimant, Alicia Carolyn Evelyn ("Ms. Evelyn").<sup>1</sup>

6. The purpose of my testimony is to assist the panel in determining, on the one hand, the entitlement of the hundreds of thousands of writers and publishers represented by the Settling Parties, and, on the other hand, the entitlement of Ms. Evelyn.

### **Previous DART Distribution Proceedings**

7. In 1996 and 1999, I submitted written testimony to the Copyright Arbitration Royalty Panels ("CARP") impaneled under the Audio Home Recording Act of 1992 regarding distribution of DART Musical Works Funds royalties. In the 1992-1994 DART proceeding, which involved royalty payments made by manufacturers and distributors of hardware and blank media for the period October 31, 1992 through December 31, 1994, I testified on behalf of the Settling Parties, the Gospel Music Coalition, and nineteen individual claimants who settled with individual members of the Settling Parties. In the 1995-1998 proceeding, which involved royalty payments made by manufacturers and distributors of hardware and blank media for the period January 1, 1995 through December 31, 1998, I testified on behalf of the Settling Parties, Copyright Management, Inc. and two individual claimants who settled with the Settling Parties. Both of these controversies involved the entitlement, if any, of Ms. Evelyn, among others, to DART royalties. In decisions rendered in both of these proceedings, the CARP allocated in

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<sup>1</sup> Ms. Evelyn has filed claims for 1999, 2000 and 2001 Writers Subfunds.

excess of 99.99% of all available royalties to the Settling Parties.<sup>2</sup> Upon recommendation of the Copyright Office (the "Office"), the Librarian of Congress (the "Librarian") adopted those findings in all material respects.<sup>3</sup> An appeal of the first of these decisions was denied and an appeal of the second was withdrawn.

### **Allocation of Royalty Payments**

8. The total amount paid in to the Musical Works Funds for the years 1999, 2000 and 2001 is \$4,308,230.06. I have been advised, according to the Licensing Division of the Office as of December 2002, that \$4,312,918.50 is available for distribution, including a total of \$1,285,770.20 in the Writers and Publishers Subfunds of the Musical Works Fund for year 1999; a total of \$1,727,747.49 in the Writers and Publishers Subfunds for year 2000; and a total of \$1,299,400.81 in the Writers and Publishers Subfunds for year 2001. Each amount is divided equally between the Writers and Publishers Subfunds.

9. Counsel has advised me that there are only two statutory criteria on which to allocate royalty payments in this proceeding: (1) transmissions of musical works to the public, *i.e.*, broadcast performances; or (2) distributions of phonorecords containing those musical works to the public, that is, sales of CDs, tapes and vinyl records. We believe that, in the particular circumstances of this proceeding and pursuant to the Librarian's precedential decisions in the two previous DART distribution proceedings, the allocation of royalty payments can be made on the basis of sales data alone. In the interest of minimizing costs, and given the small amount in

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<sup>2</sup> See Panel Decision, In the Matter of Distribution of DART Royalty Funds for 1992, 1993, and 1994, Docket No. 95-1 CARP DD 92-94 (Dec. 16, 1996); Panel Decision, In the Matter of Distribution of DART Royalty Funds for 1995, 1996, 1997 and 1998, Docket No. 99-3 CARP DD 95-98 (Nov. 17, 2000).

<sup>3</sup> See Librarian's Decision in Docket No. 95-1 CARP DD 92-94, 62 Fed. Reg. 6558 (February 12, 1997); Librarian's Decision in Docket No. 99-3 CARP DD 95-98, 66 Fed. Reg. 9360 (February 7, 2001).



controversy between the Settling Parties and Ms. Evelyn, we have not used performance data.

10. Ms. Evelyn was an ASCAP member during all or part of the period covered by this distribution proceeding. Ms. Evelyn has been a member of ASCAP since 1972. Prior to that time she had been affiliated with BMI, and she left her pre-existing catalog with BMI.

11. We requested record identification and sales information from Ms. Evelyn for the years at issue. To date, we have received no data or information from her.

12. Accordingly, to determine Ms. Evelyn's share of royalties, we used the list of titles provided by Ms. Evelyn in the 1992-1994 and 1995-1998 DART proceedings, the songs listed on Ms. Evelyn's claims for DART royalties, as well as information obtained through a global search of [www.allmusic.com](http://www.allmusic.com)<sup>4</sup> to identify Ms. Evelyn's works that have been released on records. We then confirmed the data on Muze, a musical works research database. Muze is the industry standard directory of all records, CDs, cassettes, albums, and singles that have been issued in the United States.

13. This research showed that the following titles represent Ms. Evelyn's songs that appeared on records sold in the United States during the years 1999, 2000 and 2001:

<b>Album Title</b>	<b>Artist</b>	<b>Song Title</b>	<b>Writer Credit</b>
Hard to Get-The Best of Gisele Mackenzie	Gisele Mackenzie	Pepper Hot Baby	100%
Garage Punk	Various	Pepper Hot Baby	100%
Rock It Down	Justin Tubb	Pepper Hot Baby	100%
Jaye P. Morgan on RCA	Jaye P. Morgan	Pepper Hot Baby	100%
Crests Sing All the Biggies	Crests	Six Nights A Week	50%
Best of The Crests	Crests	Six Nights A Week	50%
Crests/Duprees: 16 Candles	Crests/Duprees	Six Nights A Week	50%
CBS-FM Oldies	Various	Six Nights A Week	50%
WCBS-FM-101 History of Rock 50s	Various	Six Nights A Week	50%
For Collectors Only (Crests & Johnny Maestro)	Crests/Johnny Maestro	Six Nights A Week	50%

<sup>4</sup> This web site provides access to a comprehensive database of information regarding recording artists, albums and songs.

Album Title	Artist	Song Title	Writer Credit
Doo Wop Classics	Various	Six Nights A Week	50%
Lifetime of Music – Roots of Rock 50s	Various	Six Nights A Week	50%
Oldies But Goodies—Vol. 1	Various	Six Nights A Week	50%
Very Best of Johnny Maestro	Johnny Maestro	Six Nights A Week	50%
Golden Oldies – Vol. 2	Various	Six Nights A Week	50%
Crests Sing All The Biggies	Crests	Six Nights A Week	50%
Best Of The Rest	Crests/Johnny Maestro	Six Nights A Week	50%
For Collectors Only (Crests & Johnny Maestro)	Crests/Johnny Maestro	The Flower of Love	50%
Isn't It Amazing	Crests	The Flower of Love	50%
Best of The Crests	Crests	The Flower of Love	50%
Very Best of Johnny Maestro	Johnny Maestro	The Flower of Love	50%
The Very Best of Jackie Wilson	Jackie Wilson	I Get The Sweetest Feeling	50%
Soul Years Volume 1	Jackie Wilson	I Get The Sweetest Feeling	50%
Mr. Excitement	Jackie Wilson	I Get The Sweetest Feeling	50%
Higher and Higher	Jackie Wilson	I Get The Sweetest Feeling	50%
I Get the Sweetest Feeling	Jackie Wilson	I Get The Sweetest Feeling	50%
Smash Hits	Various	I Get The Sweetest Feeling	50%
The Brunswick Years, Vol. 1	Various	I Get The Sweetest Feeling	50%
Best of the Platters Gold	The Platters	I Get The Sweetest Feeling	50%
MVP Classic Soul, Vol. 2	Various	I Get The Sweetest Feeling	50%
Soul Inspiration	Various	I Get The Sweetest Feeling	50%
Titan of Soul	Jackie Wilson	I Get The Sweetest Feeling	50%
I Get the Sweetest Feeling	The Platters	I Get The Sweetest Feeling	50%
Classic Soul	Various	I Get The Sweetest Feeling	50%
Musicor Recordings	The Platters	I Get The Sweetest Feeling	50%
22 Gold	The Platters	I Get The Sweetest Feeling	50%
Sophisticated Soul	Various	I Get The Sweetest Feeling	50%
Now That's What I Call Music 1987	Various	I Get The Sweetest Feeling	50%
Soul Galore	Various	I Get The Sweetest Feeling	50%
Brunswick's Super Soul	Various	I Get The Sweetest Feeling	50%
The Jackie Wilson Story	Jackie Wilson	I Get The Sweetest Feeling	50%
For Collectors Only (Crests & Johnny Maestro)	Crests/Johnny Maestro	Let Me Be The One	100%
Best of the Rest	Johnny Maestro	Let Me Be The One	100%
Very Best of Johnny Maestro	Johnny Maestro	Let Me Be The One	100%
When You Dance	Turbans	Let Me Show You Around My Heart	50%
Best of The Turbans	Turbans	Let Me Show You Around My Heart	50%
For Collectors Only (Crests & Johnny Maestro)	Crests/Johnny Maestro	Isn't It Amazing	100%
Best of The Crests	Crests	Isn't It Amazing	100%
Johnny Maestro and The Crests	Crests/Johnny Maestro	Isn't It Amazing	100%
Crests Greatest Hits	Crests	Isn't It Amazing	100%
Very Best of Johnny Maestro	Johnny Maestro	Isn't It Amazing	100%
Isn't It Amazing	Crests	Isn't It Amazing	100%
Best of the Rest	Crests/Johnny Maestro	Isn't It Amazing	100%

14. We then gave the above album title information to Milt Laughlin, Vice President, Operations and Information Technology, at BMI. Mr. Laughlin examined the SoundScan data for recording titles containing the works of Ms. Evelyn and then he calculated Ms. Evelyn's share as a percentage of the total number of titles sold. SoundScan is the premier independent online information system that tracks music sales throughout the United States. It was relied upon by the CARP in the two previous DART proceedings and the suitability of its use was confirmed by the Librarian.

15. Based on my experience in the music performing rights field for over thirteen years and my extensive knowledge of the music catalogs represented by the Settling Parties (particularly the performing rights organizations), it is my opinion that, other than Ms. Evelyn's titles listed above, the Settling Parties represent the writers and publishers for all other copyrighted titles contained in recordings sold during the relevant period.

Before the  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.

In the Matter of: )

)  
Distribution of 1999, 2000 and 2001 )  
Digital Audio Recording Royalty Funds )  
)

Docket No. 2002-6 CARP DD 99-01

WITNESS AFFIDAVIT

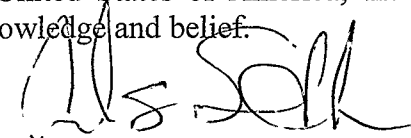
STATE OF NEW YORK )  
) ss:  
COUNTY OF NEW YORK )

I, ALISON SMITH hereby declare:

1. I am Vice President of Performing Rights of Broadcast Music, Inc. I make this affidavit in support of the Direct Case of Broadcast Music, Inc., the American Society of Composers, Authors and Publishers, SESAC, Inc., The Harry Fox Agency, Inc. and The Songwriters Guild of America dated January 15, 2003, in the above-captioned proceeding.

2. I am fully familiar with the content of the Testimony of Alison Smith.

3. Under penalty of perjury under the laws of the United States of America, the Testimony of Alison Smith is true and correct to the best of my knowledge and belief.



ALISON SMITH

1/9/03

## TESTIMONY OF MILT LAUGHLIN

### **Background**

1. My name is Milt Laughlin. I am Vice President, Operations and Information Technology, of Broadcast Music, Inc. ("BMI"). My responsibilities include directing the distribution and operational systems within the Information Technology Department at BMI. I joined BMI in 1994 as Senior Director. Prior to coming to BMI, I held management positions during 23 years with Capitol/EMI Music in Los Angeles, California and five years with the MCA Music Entertainment Group in Los Angeles, California.

2. I understand that the purpose of this arbitration proceeding is to determine the relative entitlements of the claimants to the royalties in the Writers and Publishers Subfunds of the 1999-2001 Musical Works Funds under the Audio Home Recording Act of 1992.

3. I understand from counsel that Michael Fine's testimony on SoundScan from the 1992-94 DART proceeding and my own testimony on SoundScan from the 1995-1998 DART proceeding are being incorporated by reference.

### **The Parties**

4. I am appearing today as a witness for the Settling Parties (BMI, The American Society of Composers, Authors, and Publishers ("ASCAP"), SESAC, Inc. ("SESAC"), The Harry Fox Agency, Inc ("HFA") and The Songwriters Guild of America ("SGA"), collectively the "Settling Parties").

5. The Settling Parties provided me with the lists of certain musical works composed by the only non-settling party, Alicia Carolyn Evelyn ("Ms. Evelyn").

### **Previous DART Distribution Proceeding**

6. In 1999, I submitted written testimony to the Copyright Arbitration Royalty Panel (“CARP”) impaneled under the Audio Home Recording Act of 1992 regarding distribution of DART Musical Works Funds royalties. In that proceeding, which involved royalty payments made by manufacturers and distributors of hardware and blank media for the period January 1, 1995 through December 31, 1998, I testified on behalf of the Settling Parties, Copyright Management, Inc. and two individual claimants who settled with the Settling Parties. Both of these controversies involved the entitlement, if any, of Ms. Evelyn, among others, to DART royalties. In decisions rendered in both of these proceedings, the CARP allocated in excess of 99.99% of all available royalties to the Settling Parties.<sup>1</sup> Upon recommendation of the Copyright Office (the “Office”), the Librarian of Congress (the “Librarian”) adopted those findings in all material respects.<sup>2</sup> An appeal of the first of these decisions was denied and an appeal of the second was withdrawn.

### **Calculation of Royalty Payments**

7. I have examined the SoundScan sales data for recording titles containing the works of Ms. Evelyn, which works were identified in a list provided by the Settling Parties. Several name search filters as well as Muze, a musical works research database, were utilized to enhance the results and validation of recording titles within the SoundScan sales data.

8. I calculated the relative percentage shares attributable to Ms. Evelyn by comparing her sales to the total number of titles sold, calculated by using SoundScan data for each year. I

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<sup>1</sup> See Panel Decision, In the Matter of Distribution of DART Royalty Funds for 1992, 1993, and 1994, Docket No. 95-1 CARP DD 92-94 (Dec. 16, 1996); Panel Decision, In the Matter of Distribution of DART Royalty Funds for 1995, 1996, 1997 and 1998, Docket No. 99-3 CARP DD 95-98 (Nov. 17, 2000).

<sup>2</sup> See Librarian’s Decision in Docket No. 95-1 CARP DD 92-94, 62 Fed. Reg. 6558 (February 12, 1997); Librarian’s Decision in Docket No. 99-3 CARP DD 95-98, 66 Fed. Reg. 9360 (February 7, 2001).

computed total titles sold for each year using the following formula. First, I multiplied the total sales of CDs, LPs, and cassettes (hereinafter “albums”) reported by SoundScan by 10, based on the reasonable assumption that there are, on average, ten individual songs on an album (an assumption accepted in the last DART distribution proceeding). Second, I added to the resulting figure the total number of “singles” sold during the year.

9. Using this formula, the total number of albums sold in 1999 was 754,471,229 and the total number of singles sold in 1999 was 83,588,488. For 2000, the comparable figures are 784,409,744 albums and 53,065,169 singles. For 2001, the comparable numbers are 760,293,436 albums and 31,323,348 singles. The charts showing the breakdowns are attached hereto as Exhibit 1. The total titles (albums and singles) sold are as follows: 7,628,300,778 total titles sold in 1999 (which is obtained by multiplying 754,471,229 by ten, and then adding 83,588,488); 7,897,162,609 total titles sold in 2000; and 7,634,257,708 total titles sold in 2001.

10. The Settling Parties provided me with the names of recordings containing titles claimed by Ms. Evelyn, and I compared these titles to SoundScan’s sales data for the relevant years. Based on the comparison, I determined that the number of sales reported by SoundScan for Alicia Carolyn Evelyn are as follows: (i) 35,331 titles in 1999; (ii) 35,739 in 2000; and (iii) 35,399 in 2001. These sales figures take into account the fact that multiple of Ms. Evelyn’s titles may appear on one album, and count each title. (See Exhibit 2 attached hereto.) As a percentage of total titles sold, these sales amount to: .0004632% for 1999, .0004526% for 2000 and .0004637% for 2001.<sup>3</sup>

11. The remaining record sales should be attributed to the hundreds of thousands of songwriters and music publishers represented by the Settling Parties based on Alison Smith’s

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<sup>3</sup> These percentages are based on 100% writer’s credit. These numbers are all actually smaller because most of these songs were co-written, giving Ms. Evelyn a 50% share. See Testimony of Alison Smith.

testimony and my understanding of the membership and affiliation of the performing rights organizations (BMI, ASCAP and SESAC) and the other groups comprising the Settling Parties: the HFA and SGA.

12. I have been advised that according to the previous testimony of Michael Fine, who was then Chief Executive Officer of SoundScan, the standard statistical margin for error for SoundScan's record sale data is within plus/minus 5% with a 95% confidence level. Michael Fine's testimony in the first DART distribution proceeding and my testimony in the second proceeding based on SoundScan data has been the basis for Ms. Evelyn's prior awards. Based on all available sales information from SoundScan, and using the information about the individual's title ownership provided by the Settling Parties, which information is summarized below and in Exhibit 3, the percentage shares of the Writers and Publishers Subfunds for Ms. Evelyn for each of the three years are as follows:

Claimant	1999		2000		2001	
	Writers	Publishers	Writers	Publishers	Writers	Publishers
Alicia Carolyn Evelyn	.0004632%	N/A	.0004526%	N/A	.0004637%	N/A

Based on record sales data and the representations made to me by the Settling Parties, after deducting payments to Ms. Evelyn in accordance with the computations above, the remainder of Writers and Publishers Subfunds of the Musical Works Funds for the entire period, should be allocated to the Settling Parties.



Before the  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.

In the Matter of: )

)  
Distribution of 1999, 2000 and 2001 )  
Digital Audio Recording Royalty Funds )  
)

Docket No. 2002-6 CARP DD 99-01

WITNESS AFFIDAVIT

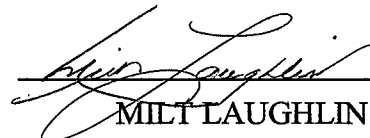
STATE OF NEW YORK )  
) ss:  
COUNTY OF NEW YORK )

I, MILT LAUGHLIN, hereby declare:

1. I am Vice President, Operations and Information Technology, of Broadcast Music, Inc. I make this affidavit in support of the Direct Case of Broadcast Music, Inc., the American Society of Composers, Authors and Publishers, SESAC, Inc., The Harry Fox Agency, Inc. and The Songwriters Guild of America dated January 15, 2003, in the above-captioned proceeding.

2. I am fully familiar with the content of the Testimony of Milt Laughlin.

3. Under penalty of perjury under the laws of the United States of America, the Testimony of Milt Laughlin is true and correct to the best of my knowledge and belief.

 1/10/03  
MILT LAUGHLIN

# Exhibit 1

## SoundScan Sales Statistics

Year	Product Type	Product Configuration					Product Type Totals
		12" Vinyl Album	Cassette	Compact Disc	Compact Disc/CDROM	Mini Compact Disc	
1999	Full-Length	1,397,609	105,079,678	647,836,426	13,087	144,429	754,471,229
2000	Full-Length	1,528,772	77,104,736	705,684,784	7,406	84,046	784,409,744
2001	Full-Length	1,256,524	49,361,696	709,534,647	113,284	27,285	760,293,436
		Product Configuration					
		Compact Disc Singles	12" Vinyl Singles	Cassette Singles	Maxi Cassette Singles	Maxi Compact Disc Singles	
1999	Singles	49,645,838	2,711,598	21,689,334	360,901	9,180,817	83,588,488
2000	Singles	32,940,253	3,184,954	8,598,504	68,337	8,273,121	53,065,169
2001	Singles	19,544,203	3,077,551	1,297,643	8,892	7,395,059	31,323,348

## Exhibit 2

### Alicia Carolyn Evelyn SoundScan Data

Album Title	Artist	Song Title	Writer Credit	Total Sales By Year		
				1999	2000	2001
Hard to Get-The Best of Gisele Mackenzie	Gisele Mackenzie	Pepper Hot Baby	100%	175	219	165
Garage Punk	Various	Pepper Hot Baby	100%	-0-	16	54
Rock It Down	Justin Tubb	Pepper Hot Baby	100%	4	5	16
Jaye P. Morgan on RCA	Jaye P. Morgan	Pepper Hot Baby	100%	130	105	94
Crests Sing All the Biggies	Crests	Six Nights A Week	50%	128	62	45
Best of The Crests	Crests	Six Nights A Week	50%	863	1,363	708
Crests/Duprees: 16 Candles	Crests/ Duprees	Six Nights A Week	50%	700	647	346
CBS-FM Oldies	Various	Six Nights A Week	50%	18	20	17
WCBS-FM-101 History of Rock 50s	Various	Six Nights A Week	50%	654	868	760
For Collectors Only (Crests & Johnny Maestro)	Crests/ Johnny Maestro	Six Nights A Week	50%	618	618	500
Doo Wop Classics	Various	Six Nights A Week	50%	3,731	4,537	6,208
Lifetime of Music – Roots of Rock 50s	Various	Six Nights A Week	50%	2,617	2,278	5,343
Oldies But Goodies—Vol. 1	Various	Six Nights A Week	50%	6,556	7,212	6,240
Very Best of Johnny Maestro	Johnny Maestro	Six Nights A Week	50%	-0-	47	121
Golden Oldies – Vol. 2	Various	Six Nights A Week	50%	165	56	66
Crests Sing All The Biggies	Crests	Six Nights A Week	50%	128	62	45
Best Of The Rest	Crests/ Johnny Maestro	Six Nights A Week	50%	97	101	106
For Collectors Only (Crests & Johnny Maestro)	Crests/ Johnny Maestro	The Flower of Love	50%	618	618	500
Isn't It Amazing	Crests	The Flower of Love	50%	17	17	23
Best of The Crests	Crests	The Flower of Love	50%	863	1,363	708
Very Best of Johnny Maestro	Johnny Maestro	The Flower of Love	50%	-0-	47	121
The Very Best of Jackie Wilson	Jackie Wilson	I Get The Sweetest Feeling	50%	6,832	5,909	5,149
Soul Years Volume 1	Jackie Wilson	I Get The Sweetest Feeling	50%	1,993	1,390	672
Mr. Excitement	Jackie Wilson	I Get The Sweetest Feeling	50%	1,177	1,060	256
Higher and Higher	Jackie Wilson	I Get The Sweetest Feeling	50%	347	841	1,735
I Get the Sweetest Feeling	Jackie Wilson	I Get The Sweetest Feeling	50%	-0-	-0-	6
Smash Hits	Various	I Get The Sweetest Feeling	50%	-0-	435	346

Album Title	Artist	Song Title	Writer Credit	Total Sales By Year		
				1999	2000	2001
The Brunswick Years, Vol. 1	Various	I Get The Sweetest Feeling	50%	199	132	156
Best of the Platters Gold	The Platters	I Get The Sweetest Feeling	50%	1,656	451	176
MVP Classic Soul, Vol. 2	Various	I Get The Sweetest Feeling	50%	127	74	36
Soul Inspiration	Various	I Get The Sweetest Feeling	50%	375	55	9
Titan of Soul	Jackie Wilson	I Get The Sweetest Feeling	50%	275	128	178
I Get the Sweetest Feeling	The Platters	I Get The Sweetest Feeling	50%	48	19	10
Classic Soul	Various	I Get The Sweetest Feeling	50%	223	230	39
Musicor Recordings	The Platters	I Get The Sweetest Feeling	50%	35	10	6
22 Gold	The Platters	I Get The Sweetest Feeling	50%	-0-	3	3
Sophisticated Soul	Various	I Get The Sweetest Feeling	50%	185	403	161
Now That's What I Call Music 1987	Various	I Get The Sweetest Feeling	50%	257	-0-	-0-
Soul Galore	Various	I Get The Sweetest Feeling	50%	2	115	39
Brunswick's Super Soul	Various	I Get The Sweetest Feeling	50%	133	75	39
The Jackie Wilson Story	Jackie Wilson	I Get The Sweetest Feeling	50%	-0-	137	16
For Collectors Only (Crests & Johnny Maestro)	Crests/Johnny Maestro	Let Me Be The One	100%	618	618	500
Best of the Rest	Johnny Maestro	Let Me Be The One	100%	97	101	106
Very Best of Johnny Maestro	Johnny Maestro	Let Me Be The One	100%	-0-	47	121
When You Dance	Turbans	Let Me Show You Around My Heart	50%	5	2	11
Best of The Turbans	Turbans	Let Me Show You Around My Heart	50%	208	138	72
For Collectors Only (Crests & Johnny Maestro)	Crests/Johnny Maestro	Isn't It Amazing	100%	618	618	500
Best of The Crests	Crests	Isn't It Amazing	100%	863	1,363	708
Johnny Maestro and The Crests	Crests/Johnny Maestro	Isn't It Amazing	100%	-0-	-0-	1,044
Crests Greatest Hits	Crests	Isn't It Amazing	100%	862	959	869
Very Best of Johnny Maestro	Johnny Maestro	Isn't It Amazing	100%	-0-	47	121
Isn't It Amazing	Crests	Isn't It Amazing	100%	17	17	23
Best of the Rest	Crests/Johnny Maestro	Isn't It Amazing	100%	97	101	106
Total Sales of Titles Credited to Alicia Carolyn Evelyn				35,331	35,739	35,399

**Exhibit 3**

**Summary of Sales Figures and Percentages of Total Sales for  
Alicia Carolyn Evelyn By Year**

Claimant	Year	Titles Sold by Claimant	Total Sales of Titles in U.S.	Claimant's % of Total Sales
Alicia Carolyn Evelyn	1999	35,331 Titles	7,628,300,778	0.0004632%
Alicia Carolyn Evelyn	2000	35,739 Titles	7,897,162,609	0.0004526%
Alicia Carolyn Evelyn	2001	35,399 Titles	7,634,257,708	0.0004637%

NOV 9 2000

COPYRIGHT ARBITRATION ROYALTY PANEL

GENERAL COUNSEL  
OF COPYRIGHT

In the Matter of:	)	
	)	
Distribution of DART Royalty Funds	)	Docket No. 99-3 CARP DD 95-98
	)	
For 1995, 1996, 1997 and 1998	)	
	)	

THE CLAIMANTS

The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), SESAC, Inc. ("SESAC"), The Harry Fox Agency, Inc. ("HFA"), The Songwriters Guild of America ("SGA"), and Copyright Management, Inc. ("CMI") (collectively, the "Settling Parties").

Eugene "Lambchops" Curry/Tajai Music Inc. ("Mr. Curry")

Alicia Carolyn Evelyn

REPORT OF THE ARBITRATION PANEL

For the reasons set forth below, we find that the Musical Works Funds, Writers and Publishers Subfunds for 1995, 1996, 1997, and 1998, should be allocated as follows:

To Mr. Curry: 0.001966% of both the Writers and Publishers Subfunds in 1995; and 0.001027% of both the Writers and Publishers Subfunds in 1997.

To Ms. Evelyn: 0.000614% of the Writers Subfund in 1995; 0.000130% of the Writers Subfund in 1997 and 0.000144% of the Writers Subfund in 1998.

To the Settling Parties: 99.997420% of the Writers Subfund and 99.998034% of the Publishers Subfund in 1995; 99.998843% of the Writers Subfund and 99.998973% of the Publishers Subfund in 1997; and 99.999856% of the Writers Subfund in 1998.

## **BACKGROUND**

### **A. The Audio Home Recording Act of 1992.**

1. On October 28, 1992, Congress enacted the Audio Home Recording Act of 1992, Pub. L. No. 102-563(1992) (the "Act"), 17 U.S.C. §1001 *et seq.* to respond to advances in digital audio recording technology. This Act requires manufacturers and importers to pay royalties on digital audio recording devices and media (DART) distributed in the United States.

2. The Act contains a royalty payment system that provides "modest compensation to the various elements of the music industry for the digital home recordings of copyrighted music." S. REP. No 294, 102d Cong., 2d Sess. 31 (1992). Manufacturers and distributors of digital audio recording devices and media bear the cost of copyright license fees that are collected by the Copyright Office ("Office") and deposited in the Treasury of the United States. 17 U.S.C. §1005.

3. By statute, the royalty fees paid are divided into two funds from which allocations are to be made: the Sound Recordings Fund, to which two-thirds are apportioned; and the Musical Works Fund, to which one-third is apportioned. 17 U.S.C. §1006(b). The Musical Works Fund is further divided evenly into the Writers Subfund and the Publishers Subfund. 17 U.S.C. 1006(b)(2)(b). This proceeding addresses only the distribution of Musical Works Fund royalties for the years 1995, 1996, 1997 and 1998.

4. The Act, as originally enacted, authorized the Copyright Royalty Tribunal ("CRT") to distribute the royalties. On December 17, 1993, Congress abolished the CRT and replaced it with copyright arbitration panels ("CARPs") administered by the Office. Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198 (1993), 107 Stat. 2304 (1993).

5. This Panel has been appointed to determine the distribution of royalties for both subfunds of the Musical Works Funds for the years 1995 and 1997 and the Musical Works Fund, Writers Subfund for 1998. *See* 17 U.S.C. §§801(b)(3), 802.

6. The Act sets forth the statutory criteria to be considered in a Musical Works Fund royalty distribution determination. 17 U.S.C. §1006 (c)(2). The only relevant criteria under the statute are "the extent to which, during the relevant period . . . musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions." *Id.*

7. The Act further provides that during the first two months of each calendar year, every interested copyright party seeking to receive royalties to which such a party is entitled shall file a claim for payment with the Librarian of Congress. 17 U.S.C. §1007(a)(1). According to the Act, interested copyright parties within each fund may agree among themselves, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf. 17 U.S.C. §1007 (a)(2). An "interested copyright party" is defined broadly by the Act to include individuals, copyright owners, and associations or other organizations representing individuals or engaged in licensing rights in musical works to music users on behalf of writers or publishers. 17 U.S.C. §1001 (7).



CARP DD '92-94, 62 Fed. Reg. 6558, 6561 (1997); *see also* Panel Decision, in the '92-94 Proceeding, Docket No. 95-1 CARP DD '92-94 (December 16, 1996).

11. That methodology was based on the direct case of the Settling Parties, which relied exclusively on distributions, as evidenced by SoundScan record sales data, to determine the percentage shares of the two individual claimants and of the Settling Parties.

12. In an extended appeals process, the Librarian's decision was upheld. *See Curry v. Librarian of Congress*, 1998 U.S. App. LEXIS 28476 (D.C. Cir. Nov. 4, 1998) (finding nothing in petitioner's claims warranting modification or remand of the Librarian's orders on review).<sup>4</sup> *See also Cannings v. Librarian of Congress, et al.*, 1999 U.S. App. LEXIS 3976 (D.C. Cir. March 2, 1999). This appeals process included both of the individuals who are parties to the current proceeding, namely Ms. Evelyn and Mr. Curry, and Mr. James Cannings ("Mr. Cannings"), who had previously been dismissed from that proceeding for failure to state a claim. Petitions for *en banc* review of the D.C. Circuit Court's decisions, filed by Ms. Evelyn, Mr. Curry and Mr. Cannings, and for a writ of certiorari before the U.S. Supreme Court and for reconsideration of denial of the writ of certiorari, filed by Mr. Cannings and Ms. Evelyn, were all denied. *See Curry v. Librarian of Congress*, 1998 U.S. App. LEXIS 28476 (D.C. Cir. Nov. 4, 1998), *cert denied sub nom Cannings v. Librarian of Congress, Evelyn v. Librarian of Congress*, 527 U.S. 1038 (1999), *petition for reh'g of denial of cert. denied*, 527 U.S. 1058 (1999).

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<sup>4</sup> The U.S. Department of Justice, which represented the Librarian, filed for administrative costs against all three of these individual claimants, and was awarded such costs against Ms. Evelyn and Mr. Cannings. Mr. Curry was granted *in forma pauperis* status. *Id.*

**C. The History of the 1995, 1996, 1997 and 1998 Proceeding.**

13. On May 4, 1999, the Copyright Office published a notice in the Federal Register requesting comment as to the existence of a controversy concerning the distribution of the 1995, 1996, 1997, and 1998 DART royalty fees in the Musical Works Funds and consolidating the consideration of the distribution of the 1995-98 Musical Works Funds into a single proceeding. 64 FR 23875 (May 4, 1999).

14. The following parties filed comments and Notices of Intent to Participate: Carl DeMonbrun/Polyphonic Music, Inc. ("DeMonbrun"); Broadcast Music, Inc. ("BMI"), the American Society of Composers, Authors and Publishers ("ASCAP"), SESAC, Inc ("SESAC"), the Harry Fox Agency ("HFA"), the Songwriters Guild of America ("SGA"), and Copyright Management, Inc ("CMI") (collectively the "Settling Parties"); James Cannings/Can Can Music ("Cannings"); Alicia Carolyn Evelyn ("Ms. Evelyn"); and Eugene "Lambchops" Curry/Tajai Music, Inc. ("Mr. Curry").

Curry"). Mr. Curry filed claims for both the Writers and Publishers Subfunds for the years 1995 and 1997, and Ms. Evelyn filed claims only for the Writers Subfunds for the years 1995, 1997 and 1998. *Id.*

15. The May 4, 1999 notice also addressed consolidating consideration of the distribution of 1995, 1996, 1997 and 1998 royalties collected pursuant to the Act and requesting comments on the existence of controversies in the consolidated proceeding and notices of intent to participate. 64 Fed. Reg. 23875. Comments on controversies were due to be filed with the Office by July 6, 1999.

16. The Settling Parties, Ms. Evelyn and Mr. Curry filed Notices of Intent to Participate and Comments on Controversies on July 2, 1999, July 14, 1999 and August

23, 1999, respectively. On September 21, 1999, the Office issued an Order announcing the precontroversy schedule for the proceeding, beginning on November 15, 1999. *See* Order in Docket No. 99-3 CARP DD 95-98 (September 21, 1999).

17. Prior to commencement of the 45-day precontroversy discovery period, the Office was notified that Mr. Cannings and Mr. DeMonbrun had settled their respective controversies with the Settling Parties. Thus, the parties who appear before this CARP in the current proceeding are the Settling Parties, Ms. Evelyn and Mr. Curry. *See*, Notices of Settlement and Withdrawals of Claims in Docket No. 99-3 DD 95-98 (November 10, 1999).

18. The September 21, 1999 Order also set the initiation of the arbitration for February 28, 2000. However, the Office's duty to publish every two years a new list of arbitrators eligible to serve on a CARP rendered the February 28 initiation date unworkable. *See* 37 CFR 251.3

19. On November 15, 1999, pursuant to the Office's scheduling Order dated September 21, 1999, the Settling Parties, Mr. Curry and Ms. Evelyn timely filed written direct cases.<sup>5</sup> As part of their direct case, the Settling Parties incorporated by reference their direct case from the '92-94 Proceeding, including exhibits and testimony presented therein, as permitted by Section 251.43 of Office regulations. *See* 37 C.F.R. § 251.43. Also on November 15, 1999, the Settling Parties filed a motion to dispense with formal hearings and to conduct this proceeding on the basis of written pleadings alone. On December 23, 1999, the Office certified the issue for decision by this Panel. *See* Order in Docket No. 99-3 CARP DD 95-98 (December 23, 1999). In addition, on November 15,

1999, the Settling Parties filed a motion for full distribution of royalties for years and funds in which no controversy existed and for partial distribution of all remaining DART royalties for the years at issue in this proceeding. The Office granted the motion for full distribution with respect to years and funds not in controversy (namely, the entire 1996 Musical Works Fund and the 1998 Publishers Subfund of the Musical Works Fund) and granted in part the motion for partial distribution for the remaining funds and years. *See* Order in Docket No. 99-3 CARP DD 95-98 (December 23, 1999.)

20. On December 16, 1999, the Settling Parties filed a motion to compel production of documents from Mr. Curry regarding the assertion in his direct case that he had sales amounting to at least 300,000 units. In an Order dated January 7, 2000, the Office granted this motion to compel. *See* Order in Docket No. 99-3 CARP DD 95-98 (January 7, 2000). No response to the Office's Order was received from Mr. Curry.

21. On January 14, 2000, in accordance with Sec. 251.3(b), the Office published the list of arbitrators eligible to serve on a CARP initiated during 2000 and 2001. 65 FR 2439 (January 14, 2000). Because the time period between the publication of the Arbitrator list and the February 28 initiation date was not sufficient to complete the selection of arbitrators for this proceeding, the Office reset the initiation of the arbitration to April 10, 2000. *See* Order in Docket No. 99-3 CARP DD 95-98 (March 14, 2000).

22. On April 10, 2000, the Office published a notice initiating the 180-day arbitration period for this proceeding. 65 FR 19025 (April 10, 2000). Once the arbitrators for this proceeding were selected, the Office scheduled the initial meeting between the arbitrators and the parties for May 16, 2000. However, the chairperson of

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<sup>5</sup> Ms Evelyn asserts that she was not served with her copy until November 17, 1999. However, the CARP rules do not require that each party receive pleadings simultaneously with the CARP. 37 C.F.R.

the panel resigned out of concern that potential conflicts of interest, which were not known to the arbitrator at the time of selection, may exist under Sec. 251.32. Because of these concerns, the Copyright Office canceled the May 16, 2000 meeting between the parties and the original panel of arbitrators.

23. Pursuant to Sec. 251.6(f), the remaining two arbitrators selected a new chairperson. On June 14, 2000, in accordance with Sec. 251.6(f), the Office announced the suspension of the 180-day arbitration period from May 16, 2000 to June 16, 2000, the resumption of the 180-day period on June 16, 2000, the new chairperson of the panel, and the time and place of the rescheduled initial meeting, which took place on June 19, 2000. *See* 65 FR 37412 (June 14, 2000).

24. On June 19, 2000 the parties to this proceeding met with the arbitrators for the purpose of setting a schedule and discussing the procedural aspects of this proceeding. A key procedural issue before the panel at the outset of the proceeding was the consideration of the issue designated to this CARP of whether to suspend formal hearings and make the determination as to the distribution of the 1995-98 DART royalties in the Musical Works Funds on the written pleadings. *See* Order in Docket No. 99-3 CARP DD 95-98 (December 22, 1999). The CARP heard argument from all parties. The CARP announced its decision to waive the requirement of oral evidentiary hearings, to proceed upon the written record alone, and to permit the filing of written rebuttal cases. The panel issued an Order that set forth the schedule that would govern the remainder of the proceeding. *See* Order in Docket No. 99-3 CARP DD 95-98 (June 19, 2000), 65 Fed. Reg. 41737 (June 30, 2000).

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§251.44(f). In any event, Ms. Evelyn suffered no prejudice by the two-day delay.

25. In its order, the Panel offered the parties the opportunity to revise their claims (on or before July 7, 2000) and to submit a rebuttal case (on or before July 28, 2000), and set deadlines for the submission of proposed findings of fact and conclusions of law (on or before August 18, 2000) and reply findings (on or before August 28, 2000). The Panel requested that the proposed findings of fact include specific calculations of royalty entitlements. Preconference Hearing Before the Panel In the Matter of Distribution of 1995, 1996, 1997 and 1998 Digital Audio Recording Funds, June 19, 2000, Tr. at 93. *See also* Schedule, 65 Fed. Reg. at 41738.

26. On July 3, 2000, Mr. Curry revised the claim in his direct case to be 1% of the Writers Subfund and 1% of the Publishers Subfund of the Musical Works Fund. Mr. Curry stated: "I am claiming this percent because I am one person and believe the lowest dominator in my case is 1 (one)" *See* Revision of Claim in Direct Case of Eugene Curry in Docket No. 99-3 CARP DD 95-98 (July 3, 2000) ("Revision of Claim of E. Curry"). On July 27, 2000, Ms. Evelyn filed a rebuttal case, which consisted in large part of a document dated November 21, 1999, previously submitted to and rejected by the Office as inappropriate under Office rules. *See* Order in Docket No. 99-3 DART DD 95-98 (November 24, 1999); *see also* Rebuttal Case of Alicia Carolyn Evelyn in Docket No. 99-3 CARP DD 95-98 (July 27, 2000) ("Rebuttal Case of A. Evelyn"). In her rebuttal case, Ms. Evelyn revised the claim in her direct case to 1% of the Writers Subfund of the Musical Works Fund for the years 1995, 1996, and 1998. *See* Addendum to Rebuttal Case of A. Evelyn.

## FINDINGS OF FACT

27. The Settling Parties proposed that the Musical Works Fund royalties at issue be distributed among themselves, Mr. Curry and Ms. Evelyn proportionately according to the extent the evidence establishes that musical works claimed by each party were distributed in the form of recordings in the United States during the relevant time period. *See* Written Direct Case of Settling Parties ("direct case") in Docket No. 99-3 CARP DD 95-98, at 7-8. A Musical Works Fund distribution determination can be based on either performance data, sales data, or both. *See* 17 U.S.C. §§ 1006 (c)(2), 1001 (6). In the interest of minimizing costs, and given the small amount in controversy, the Settling Parties presented a direct case based on sales data alone. *See* Testimony of Alison Smith ("Smith test"), Tab A of Direct Case of the Settling Parties at ¶ 9.

28. The Settling Parties' analysis was in three parts. First, as representatives of virtually every songwriter and music publisher with claims to Musical Works Fund royalties other than Mr. Curry and Ms. Evelyn, the Settling Parties claimed, on behalf of those songwriters and music publishers, credit for all record sales in the United States during 1995, 1996, 1997 and 1998, other than those sales attributable Mr. Curry and Ms. Evelyn. Second, the Settling Parties established the universe of record sales for 1995, 1996, 1997 and 1998, the years still in controversy in the current proceeding. And finally, they determined what portion of that total universe of record sales are attributable to song titles authored and/or published by Mr. Curry and Ms. Evelyn in the years for

which these two individuals filed claims in this proceeding.<sup>6</sup> *See generally* Direct Case of the Settling Parties.

**A. The Settling Parties Represent All Claims Except Those of Mr. Curry and Ms. Evelyn.**

29. The Settling Parties consist of BMI, ASCAP, SESAC, HFA, SGA and CMI. In the aggregate, the Settling Parties represent hundreds of thousands of domestic songwriters and music publishers, as well as the songwriters and music publishers of foreign performing rights and mechanical rights organizations that have authorized the Settling Parties to act on their behalf in this proceeding. *See* claims of each of the Settling Parties and accompanying lists of the individual songwriter and music publisher claimants represented in this proceeding by each of the Settling Parties.

30. The Settling Parties introduced testimony from Alison Smith, Vice President, Performing rights, of BMI. Ms. Smith has been an employee of BMI since 1985 and, for the past eleven years, her concentration within BMI has been in the area of royalty distributions for radio and television performances. As Vice President of Performing Rights, she is familiar with those aspects of BMI's operations designed to monitor performances of music on radio and television stations, as well as broadcast and cable television networks. Ms. Smith is generally familiar with the music industry. Smith Test. at ¶¶ 2-3.

31. Based on her long experience in the music performing rights field and extensive knowledge of the music catalogs represented by the Settling Parties, Ms. Smith

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<sup>6</sup> Prior to filing their Direct Case, the Settling Parties requested record identification and sales information from Ms. Evelyn and Mr. Curry but did not receive any such data. The Settling Parties used other available information, including information concerning the catalogues of Mr. Curry and Ms. Evelyn maintained by BMI and ASCAP, respectively, as part of Mr. Curry's affiliation with BMI and Ms. Evelyn's membership with ASCAP, to identify records and to calculate record sales attributable to Ms. Evelyn and Mr. Curry. *See* Smith testimony at 10-12.



stated that the Settling Parties represent the writers and publishers of virtually all song titles contained on records sold during the time period relevant to this proceeding other than sales of titles that may be attributable to Mr. Curry or Ms. Evelyn. Smith Test. at ¶ 15.

32. An essential aspect of making a distribution to claimants in any given distribution proceeding under the AHRA is determining the universe of sales or other form of distribution. Once established, this universe provides a systematic basis for then determining individual shares. The Settling Parties have incorporated by reference the prior testimony of Michael Fine, co-founder and Chief Executive Officer of SoundScan, which established the basis for determining total record sales and record sales for the two individual claimants in the '92-94 Proceeding. See Tab B of the Settling Parties' Direct Case in the '92-94 Case, incorporated by reference in this proceeding.<sup>7</sup>

33. SoundScan, which first became available in early 1991, is the premier independent online information system that tracks music sales throughout the United States. Fine Test. at ¶¶ 1 & 3. SoundScan gathers point-of-sale data from over 14,000 reporting entities, including retail and mass merchandisers. *Id.* at ¶4. Each week, these reporting entities from point-of-sale cash registers send the data by modem to SoundScan. *Id.* Data files consist of store ID number, piece counts and the Universal Product Codes. *Id.* Currently, all major record labels and most independent labels subscribe to SoundScan, and *Billboard Magazine* music charts are constructed directly from SoundScan data. *Id.*

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<sup>7</sup> 37 C.F.R. § 251.43 provides that "each party may designate a portion of the past records . . . that it wants included in its direct case."

34. Based on his analysis of SoundScan data, Mr. Fine concluded that apart from "a relatively small number of sales" attributable to Mr. Curry and "minimal sales" attributable to Ms. Evelyn, "100% of the remaining record sales should be attributable to the hundreds of thousands of songwriters and music publishers represented by the Settling Parties." Fine Test. at ¶8.<sup>8</sup>

35. This conclusion was adopted by the Librarian in his Distribution Order for the previous distribution under the AHRA. See Librarian's Decision in the '92-94 Proceeding, Docket No. 95-1 CARP DD 92-94, 62 Fed. Reg. 6558, 6561 (1997) (adopting the Panel's approach of first finding that "the Settling Parties represented all claims except for those of Mr. Curry and Ms. Evelyn" and then accepting the presentation of evidence for the two individual claimants' share of the royalties and deducting this sum from 100% to determine the Settling Parties' share of the royalties).

**B. The Settling Parties Introduced Sales Data For the Universe Of All Works Distributed During The Relevant Time Period.**

36. For this proceeding, the Settling Parties introduced testimony of Milt Laughlin, the Assistant Vice President of Application Systems at BMI, to establish the universe of SoundScan record sales data for 1995, 1996, 1997 and 1998. When he joined BMI in 1995, Mr. Laughlin had almost 30 years experience in the music industry and had held management positions with various music entertainment companies. See Testimony of Milt Laughlin ("Laughlin Test."), Tab B of Direct Case of the Settling Parties at ¶1.

37. Relying upon SoundScan for the periods at issue in the current proceeding, Mr. Laughlin introduced SoundScan data establishing the universe of total sales for the

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<sup>8</sup> SoundScan data tracks record sales, which include both "albums" and "singles." The term "album" is used to refer to all long-playing music formats including compact discs (CDs), cassette albums, as well as

years in question. Mr. Laughlin then provided testimony to establish, based on the reasonable assumption that, on average, there are 10 song titles on each album,<sup>9</sup> the total sales of song titles in the United States during the three years at issue in the current proceeding. *Id.* at ¶7. The details of Mr. Laughlin's analysis are set forth below:

CHART A

Item	1995	1997	1998
1) Total Album Sales	615,844,812	651,672,412	727,951,653
2) Total Titles on Albums Sold	6,158,448,120	6,516,724,120	7,279,516,530
3) Total Single Sales	98,844,778	134,585,737	111,888,334
4) Total Sales of Titles on Albums and Singles (2 + 3)	6,257,292,898	6,651,309,857	7,391,404,864

*Id.* at ¶8.

**C. The Settling Parties' Data on Sales Information for Mr. Curry and Ms. Evelyn Demonstrate Only A Few Sales for Each During the Relevant Period.**

38. During negotiations held prior to the commencement of this proceeding, Mr. Curry and Ms. Evelyn failed to adequately identify the titles of songs that they claim would provide a means to calculate their shares, and did not offer credible alternative method to calculate shares. Nonetheless, the Settling Parties used the list of titles from the '92-94 Proceeding, the songs listed on the Settling Parties' claims for DART royalties, as well as globally searching on "www.allmusic.com"<sup>10</sup> to identify the works of Ms. Evelyn and Mr. Curry that have been released on records to calculate record sales attributable to Ms. Evelyn and Mr. Curry. Smith Test. at ¶10. The Settling Parties then used Phonolog, the industry standard directory of all records, CDs, cassettes, albums and

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the traditional 33 r.p.m. vinyl records. The term "singles" refers to shorter format CDs, cassettes and 45 r.p.m. records.

<sup>9</sup> There is no credible evidence in the record of any other estimate of song titles per album.

<sup>10</sup> This web site provides public access to a comprehensive database of information regarding recording artists, albums and songs.

singles that have been issued in the United States to determine all albums and singles on which these musical works have appeared. Smith Test. at ¶¶12, 13.

39. Phonolog data showed that the following six titles claimed by Mr. Curry appear on five albums and on single sold during 1995 and/or 1997, the only two years of the four implicated in this proceeding in which Mr. Curry filed claims:

CHART B

Album Title (s) = Single	Artist	Song Title
Burnin'	P. Labelle	Somebody Loves You Baby
Burnin'	P. Labelle	Burnin'
This Christmas	P. Labelle	Born In A Manger
This Christmas	P. Labelle	O Holy Night
Patti Labelle Live	P. Labelle	Somebody Loves You Baby
Gems	P. Labelle	If I Didn't Have You
Put Love To Work	Wooten Brothers	Hasty Decisions

Smith Test. at ¶ 13.

40. Phonolog data showed that the following six song titles claimed by Ms. Evelyn appear on twenty albums sold during 1995, 1996, 1997 and 1998, the only years relevant to this proceeding in which Ms. Evelyn filed claims:

# CHART C

Album Title	Artist	Song Title
Hard To Get-The Best of Gisele Mackenzie	Gisele Mackenzie	Pepper Hot Baby
Best of Petula Clark	Petula Clark	I'm Counting On You
Sing All The Biggies	Crests	Six Nights A Week
WCBS-FM-101 History of Rock: The 50's pt. 2	Various Artists	Six Nights A Week
Oldies But Goodies: Doo Wop Classics	Various Artists	Six Nights A Week
Isn't It Amazing	Crests	The Flower of Love
The Very Best Of Jackie Wilson	Jackie Wilson	I Get The Sweetest Feeling
Mr. Excitement	Jackie Wilson	I Get The Sweetest Feeling
Higher and Higher (1997)	Jackie Wilson	I Get The Sweetest Feeling
Heart and Soul	Various Artists	I Get The Sweetest Feeling
The Brunswick Years Vol. 1 (1995)	Various Artists	I Get The Sweetest Feeling
Sisters of Soul	Various Artists	I Get The Sweetest Feeling
MVP Classic Soul Vol. 2	Various Artists	I Get The Sweetest Feeling
Soul Inspiration	Various Artists	I Get The Sweetest Feeling
Titan of Soul	Various Artists	I Get The Sweetest Feeling
Love Power: 20 Smash Hits of the 70s	Various Artists	I Get The Sweetest Feeling
Gold	The Platters	I Get The Sweetest Feeling
Masters	Jackie Wilson	I Get The Sweetest Feeling
When You Dance	Turbans	Let Me Show You Around My Heart
Reet Petite	Jackie Wilson	Let Me Show You Around My Heart

Smith Test. at ¶ 13.

41. Mr. Curry was both a co-author and a co-publisher of the songs identified in Chart B above; and Ms. Evelyn was co-author of the last four songs identified in Chart

C above. Smith Test. at ¶ 13. Mr. Curry's and Ms. Evelyn's respective shares were, however, calculated based on their total sales and not the sales of their song titles proportionate to the extent of their respective co-authorship of each work. Laughlin Test. at ¶ 9.

42. Ms. Smith testified that Mr. Curry is entitled to credit as a co-author and co-publisher for each of his six songs as follows:

CHART D

Song Title	Co-author Share	Co-publisher Share
Somebody Loves You Baby	50%	33.33%
Burnin'	50%	33.33%
Born in a Manager	25%	0%
O Holy Night	10% <sup>11</sup>	2.5%
If I Didn't Have You	50%	50%
Hasty Decision	50%	50%

*Id.*

43. Ms. Smith also testified that Ms. Evelyn is entitled to credit as author or co-author for her six titles as follows:

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<sup>11</sup> Award for co-authorship of an arrangement of a public domain work.

CHART E

Song Title	Co-author Share
Six Nights A Week	50%
The Flower of Love	50%
I Get the Sweetest Feeling	50%
Let Me Show You Around My Heart	50%
Pepper Hot Baby	100%
I'm Counting on You	100%

*Id.*

44. The Settling Parties provided to Mr. Laughlin the Phonolog information listing the records containing the songs authored and/or published by Mr. Curry and Ms. Evelyn. Smith Test. at ¶ 14.

45. By using the SoundScan data, Mr. Laughlin determined the number of units (albums and singles) sold containing songs claimed by Mr. Curry and Ms. Evelyn. Laughlin Test. at ¶ 9.

46. Mr. Laughlin's testimony showed that Mr. Curry should be credited with song title sales of 123,042 in 1995 and 68,295 in 1997. This panel has not been presented with a credible alternate method of calculating Mr. Curry's share beyond his assertion of entitlement to 1%. Laughlin Test. at ¶ 9. The details of Mr. Laughlin's analysis with respect to Mr. Curry are contained in the following chart:

CHART F

Album Title (s) = Single	Artist	Song Title	Total Sales in Year	
			1995	1997
Somebody Loves You Baby (s)	Patti Labelle	Somebody Loves You Baby	14	-0-
Live!	Patti Labelle	Somebody Loves You Baby	25,521	18,676
Burnin'	Patti Labelle	Somebody Loves You Baby	11,105	6,300
Put Love To Work	Wooten Brothers	Hasty Decisions	108	14
Gems	Patti Labelle	If I Didn't Have You	55,282	9,703
This Christmas	Patti Labelle	Born In A Manger	9,953	13,651
This Christmas	Patti Labelle	O Holy Night	9,953	13,651
Burnin'	Patti Labelle	Burnin'	11,105	6,300
Total Sales of Titles Credited to Eugene "Lambchops" Curry			123,042	68,295

Laughlin Test. at ¶ 9 (Exhibit 3), Settling Parties Direct Case.

47. Mr. Laughlin's testimony also showed that Ms. Evelyn should be credited with song titles sales of 38,424 in 1995, 8,640 in 1997 and 10,625 in 1998. Laughlin Test. at ¶ 9 (Exhibit 2) <sup>12</sup> Ms. Evelyn has not presented this panel with a credible alternate method of calculating her share beyond her assertion of entitlement to 1%. The details of Mr. Laughlin's analysis with respect to Ms. Evelyn are contained in the following chart:

<sup>12</sup> Mr. Laughlin based Ms. Evelyn's sales figures on 100% writers credit, notwithstanding the fact that Ms. Evelyn should only be credited for 50% share based on her co-authorship of many of her works. See Laughlin Test. at ¶ 9 fn. 1.



# CHART G

Album Title	Artist	Song Title	Total Sales in Year		
			1995	1997	1998
Hard to Get The Best of Gisele Mackenzie	Gisele Mackenzie	Pepper Hot Baby	-0-	217	261
Best of Petula Clark	Petula Clark	I'm Counting on You	-0-	21	76
Sing All The Biggies	Crests	Six Nights A Week	-0-	234	189
WCBS-FM-101 History of Rock: The 50's pt. 2	Various Artists	Six Nights A Week	-0-	1,464	799
Oldies But Goodies: Doo Wop Classics	Various Artists	Six Nights A Weeks	4,355	2,500	2,283
Isn't It Amazing	Crests	The Flower of Love	-0-	88	51
Very Best of Jackie Wilson	Jackie Wilson	I Get The Sweetest Feeling	-0-	1	4,348
Mr. Excitement	Jackie Wilson	I Get the Sweetest Feeling	1,224	647	246
Higher and Higher	Jackie Wilson	I Get The Sweetest Feeling	21,098	2,394	345
Heart and Soul	Various Artists	I Get the Sweetest Feeling	-0-	107	27
Brunswick Years, Vol. 1	Various Artists	I Get the Sweetest Feeling	-0-	206	164
Sisters of Soul	Various Artists	I Get The Sweetest Feeling	-0-	508	783

MVP Classic Soul, Vol. 2	Various Artists	I Get The Sweetest Feeling	-0-	-0-	134
Soul Inspiration	Various Artists	I Get The Sweetest Feeling	-0-	-0-	278
Titan of Soul	Various Artists	I Get The Sweetest Feeling	-0-	-0-	44
Love Power: 20 Smash Hits Song of 70's	Various Artists	I Get The Sweetest Feeling	4	1	-0-
Gold	The Platters	I Get The Sweetest Feeling	11,368	82	8
Masters	Jackie Wilson	I Get The Sweetest Feeling	-0-	-0-	274
When You Dance	Turbans	Let Me Show You Around My Heart	52	34	17
Reet Petite	Jackie Wilson	Let Me Show You Around My Heart	323	137	178
Total Sales of Titles Credited to Alicia Carolyn Evelyn			38,424	8,640	10,625

Laughlin Test. at ¶ 9 (Exhibit 2 Settling Parties Direct Case).

48. Mr. Laughlin then used the following formula to determine Mr. Curry's and Ms. Evelyn's percentage entitlement for each of the subfunds to which Mr. Curry and Ms. Evelyn had filed claims:

$$\frac{\text{Total song titles sales credited to Claimant in year X}}{\text{Total song titles sold during year X}} = \text{Claimant's proportionate share of total royalties in year X}$$

49. Based on this formula, Mr. Laughlin determined that Mr. Curry's and Ms. Evelyn's percentage entitlement based on total sales to be as follows: Mr. Curry is entitled to 0.001966% of both subfunds for 1995 and 0.001027% of both subfunds for

1997; Ms. Evelyn is entitled to 0.000614% of the Writers Subfund for 1995, 0.000130% of the Writers Subfund for 1997 and 0.000144% of the Writers Subfund for 1998. Laughlin Test. at ¶ 9.

**D. Neither Mr. Curry nor Ms. Evelyn Presented Evidence of Record Sales or Performances of Their Works During 1995, 1996, 1997 or 1998.**

50. In their direct cases, their amended claims and their rebuttal cases, neither Mr. Curry nor Ms. Evelyn submitted credible evidence of sales or performances during the time period relevant to this proceeding. *See generally* Direct Case of Alicia Carolyn Evelyn in Docket No. 99-3 CARP DD 95-98 (November 15, 1999) ("Direct Case of A. Evelyn"); Direct Case of Eugene "Lambchops" Curry in Docket No. 99-3 CARP DD 95-98 (November 15, 1999) ("Direct Case of E. Curry"); Revision of Claim of E. Curry; Rebuttal Case of A. Evelyn.

51. Mr. Curry's direct case states "My sales count is more than the parties claim. They are at least 300,000 units." *See* Direct Case of E. Curry.

52. Ms. Evelyn's Exhibit 1 to her direct case lists "songs, works, and artists found at CD and other music sites which would serve to increase claimant's share of DART royalties but which are not included in the Settling Parties' computation of her share." Neither this exhibit, nor any other documentation in Ms. Evelyn's direct case or rebuttal case provides any evidence of actual sales or performances of the works listed during the relevant period. *See generally* Direct Case of A. Evelyn; Direct Case of E. Curry; Revision of Claim of E. Curry; Rebuttal Case of A. Evelyn.

53. Neither Mr. Curry nor Ms. Evelyn proposed any systematic method or formula for determining their respective awards, or any others claimants' award in this

proceeding. *See generally* Direct Case of A. Evelyn; Direct Case of E. Curry; Revision of Claim of E. Curry; Rebuttal Case of A. Evelyn.

### CONCLUSIONS OF LAW

**A. The Statutory Criteria For Distribution of DART Musical Works Fund Royalties Are Sales Or Performances During The Relevant Period and Soundscan Data Meets the Statutory Criteria for Calculating Sales.**

54. This panel must be guided by relevant provision of the copyright law (particularly the Audio Home Recording Act of 1992), as well as previous decisions of the Librarian and Office rules and regulations. See 17 U.S.C. §§ 801(b)(3) and (c); 802(c); and 37 C.F.R. 251.7. The Copyright Act states that the Panel must act "on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations and (relevant) rulings of the Librarian of Congress." See 17 U.S.C. § 802(c); *see, e.g.*, Librarian's Decision in the '92-94 Proceeding, 62 Fed.Reg. 6558 (1997).

55. The Audio Home Recording Act of 1992 clearly delineates the statutory criteria to be considered when making distribution of DART royalties. Specifically, a CARP may only consider "the extent to which, during the relevant period . . . each musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions." 17 U.S.C. 1006(c)(2). "While a CARP is limited to these two statutory criteria in determining a DART royalty distribution, the statute does not require the application of both criteria. Thus, in circumstances where the parties to a DART distribution have presented evidence as to only one of the criteria, there is no requirement that a CARP request evidence as to the

second criteria as well." Librarian's Decision in the '92-94 Proceeding, 62 Fed.Reg. 6561 (1997).

56. In the '92-94 Proceeding the parties presented credible evidence only as to the distribution criteria (record sales), in the form of SoundScan sales data, rather than evidence of performances. The Librarian ruled that "the Panel acted properly in basing its determination solely on the evidence of record sales, and was not required to take record evidence as to the dissemination of musical works in transmissions when no such evidence was submitted by the parties. Further, the Register determined that the Panel acted properly by refusing to consider evidence presented by Ms. Evelyn and Mr. Curry that was not relevant to the section 1006(c)(2) criteria." *See*, CARP Report, para. 52. Librarian's Decision in the '92-94 Proceeding, 62 Fed.Reg. 6561 (1997).

**B. The Settling Parties Are Entitled to 100% of the Funds Available for Distribution in the Current Proceeding After Deducting the Shares of Both Mr. Curry and Ms. Evelyn.**

57. The methodology presented in this distribution proceeding for determining shares of individual claimants has been relied upon and accepted by the Librarian in the '92-94 Proceeding and in other precedential decisions. *See* Order, Determination of the Distribution of the 1991 Cable Royalties in the Music Category, Docket No. 94-3 CARP CD 90-92, 63 Fed.Reg. 20428, 20430 (1998); *see also* Phase II Distribution Report in the Matter of distribution of 1990, 1991, and 1992 Cable Royalty Funds, Docket No. 94-3 CARP CD 90-92 (February 25, 1998).

58. "The Settling Parties presented the only systematic method for determining the distribution of the royalties in the Musical Works Funds. The formula divided the total song title sales credited to a claimant during a particular year by the total

song titles sold during the same year.” Librarian’s Decision in the ‘92-94 Proceeding, 62 Fed.Reg. 6561 (1997). The formula is as follows:

$$\frac{\text{Total song titles sales credited to Claimant in year X}}{\text{Total song titles sold during year X}} = \text{Claimant's proportionate share of total royalties in year X}$$

The current proceeding involved the relative entitlement of the Settling Parties, on the one hand, and Mr. Curry and Ms. Evelyn, on the other, to the award of shares of Musical Works Fund royalties paid to the Office for the period January 1, 1995, through December 31, 1998 (excluding 1996).<sup>13</sup> After deduction of the costs of this arbitration and reasonable administrative costs incurred by the Office, all of the remaining funds must be distributed. *See* 17 U.S.C. § 1007(c).

59. No other alternative systematic method or formula for calculating a claimant’s share of royalties has been submitted. Mr. Curry and Ms. Evelyn have suggested that as individuals, they are entitled to a baseline of 1% of royalties. *See* Proposed Distribution Order A. Evelyn, Docket No. 99-3 CARP DD 95-98, August 18, 2000; Findings of Fact and Conclusions of Law E. Curry, Docket No. 99-3 CARP DD 95-98, August 17, 2000. This proposal is neither systematic nor mathematically sound given the thousands of writers and publishers of Musical Works entitled to receive DART royalties. If each of the thousands of claimants represented in this proceeding were to receive 1% of the DART royalties available for distribution, the total claimed would quickly exceed 100%.

60. Applying the Settling Parties’ formula, Mr. Curry and Ms. Evelyn receive credit for record sales in proportion to their respective “writers and/or publishers share”

of each title sold. This formula is consistent with the statutory criteria. The Librarian found the approach "logical and consistent and . . . fully within the discretion of the Panel" in the '92-94 Proceeding. Librarian's Decision in the '92-94 Proceeding, 62 Fed.Reg. 6561 (1997).

**C. The Settling Parties Have Established the Universe of Record Sales to the Public.**

61. The Settling Parties submitted the only credible evidence by which a distribution determination may be made. They submitted data which shows the extent to which musical works have been distributed in the form of recordings during the relevant period. The Settling Parties presented testimony based on an analysis of SoundScan data that established the universe of record sales. For the relevant period, the SoundScan data establishes total album and single unit sales. Assuming, unchallenged, 10 songs on each album, the total number of song titles sold each year were as follows:

1995----- 6,257,292,898

1997----- 6,651,309,857

1998----- 7,391,404,864

62. Mr. Curry and Ms. Evelyn challenge the efficacy of the use of SoundScan data on several basis. They argue that it is incomplete in failing to include record club, computer and foreign sales figures. While it is true that including record club and computer sales may have increased Mr. Curry's and Ms. Evelyn's sales figures, they would increase those figures for all claimants. The Settling Parties are correct that adding to the universe of sales would in all likelihood decrease the amount of any award

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<sup>13</sup> Ms. Evelyn, in her rebuttal case, alleges that funds for 1996 and 1998 (Publishers Subfund) are in controversy. See Rebuttal Case of A. Evelyn at ¶ 1. No claims, however, were filed for these funds except for those of the Settling Parties. See 17 U.S.C. § 1007(a)(1).

to Mr. Curry and Ms. Evelyn. Nevertheless, Mr. Curry and Ms. Evelyn have not presented any alternative means for calculating the universe of sales and/or their own sales, with or without the inclusion of record club and computer sales. Furthermore, the inclusion of foreign sales in sales figures is not authorized by the Act. *See* 17 U.S.C. § 1006(c)(2) (allocating royalty payments based on distributions; 17 U.S.C. § 1001 (6)(3) (defining the term “distribute” to include only sale, lease or assignments of products to consumers in the United States or for ultimate transfer to consumers in the United States).

**D. The Evidence Establishes That Mr. Curry/Tajai Music and Ms. Evelyn are Entitled to No More Than 0,001966% of Both the Writers and Publishers Subfunds for 1995 and 0.001027% of Both the Writers and Publishers Subfunds for 1997.<sup>14</sup>**

63. The Settling Parties used total sales to calculate the percentage entitlements of Mr. Curry/Tajai Music and Ms. Evelyn, thereby giving each the equivalent of 100% credit (writers and/or publishers) for all of their respective titles. The Settling Parties therefore attributed to Mr. Curry and Ms. Evelyn more than their actual percentage entitlement based on works that were co-authored and/or co-published by each. Mr. Curry did not submit any evidence of record sales or performance data, nor did he provide such information when compelled to do so by the Office. *See* Order in Docket No. 99-3 CARP DD 95-98 (January 7, 2000). Mr. Curry did not provide any information or evidence to support his claim that his sales count “is at least 300,000 units.” He has not met his burden of proving entitlement to DART royalty funds.

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<sup>14</sup> Mr. Curry and Ms. Evelyn, in their written submissions to this Panel, raise several issues related to data compilations of the Settling Parties, their own listings, etc. This Panel fully considered all of the issues raised and allegations contained therein. The Panel, however, is bound to rely upon only the credible record evidence in its Report.



64. The Settling Parties point out that although Mr. Curry failed to meet his burden of proof, they introduced evidence of sales of Mr. Curry's musical works during the relevant years, and he should be compensated on that basis.

65. The Settling Parties, through their direct case, identified six song titles written by Mr. Curry which appear on five albums sold in the United States during 1995 and 1997. The Settling Parties used these song titles to calculate Mr. Curry's total song title sales of 123,042 units in 1995 and 68,295 in 1997.

66. Using the total song title sales figures from SoundScan for each year, Mr. Curry's award in each year should be determined for each Subfund using the following formula:

$$\frac{\text{Mr. Curry's sales in year X}}{\text{SoundScan Total Sales for Year X}} = \text{Mr. Curry's Percentage Entitlement in Year X}$$

67. Applying this formula to the evidence presented by the Settling Parties of Mr. Curry's total sales, Mr. Curry's entitlement to a percentage award for each Subfund in each year is limited to the following:

Claimant	1995		1997	
	Writer	Pub.	Writer	Pub.
Eugene "Lambchops" Curry (Tajai Music)	0.001966%	0.001966%	0.001027%	0.001027%

68. As Mr. Curry did not provide any support for his statement that his sales were at least 300,000 units, references to this information in Mr. Curry's direct case cannot provide any basis for an award from the 1995 or 1997 DART Musical Works Funds. See Panel Decision in the '92-94 Proceeding at ¶ 63 (December 16, 1996)

(finding that Mr. Curry's claim could not be supported in view of the fact that Mr. Curry refused to produce sales or performance data concerning songs claimed, even when ordered to do so by the Office).

69. In her direct case and her rebuttal of the direct case of the Settling Parties, Ms. Evelyn introduced no evidence or sales of performances of her musical works. She provided a list of songs "which would serve to increase claimant's share of DART royalties," which does not include any information concerning sales or dates or numbers of performances. Without this additional information, the document provides no basis for establishing a percentage award for Ms. Evelyn.

70. Ms. Evelyn has failed to meet her burden of proof of her entitlement to DART royalty funds. However, the Settling Parties, through their direct case, identified six song titles written by Ms. Evelyn that appear on twenty albums sold in the United States during 1995, 1997 or 1998, the only years for which Ms. Evelyn filed claims in this proceeding. From this information, the Settling Parties determined that Ms. Evelyn's total song title sales in 1995 were 38,424, in 1997 were 8,640 and in 1998 were 10,625.

71. Using the total song title sales figures from SoundScan for each year, Ms. Evelyn's award in each year should be determined for each Subfund using the following formula:

$$\frac{\text{Ms. Evelyn's sales in Year X}}{\text{SoundScan Total Sales in Year X}} = \frac{\text{Ms. Evelyn's Percentage Entitlement in Year X}}{\text{in Year X}}$$

72. Applying this formula to the evidence in the record, as submitted by the Settling Parties, Ms. Evelyn's entitlement to a percentage award for each Subfund in each year is limited to the following:

Claimant	1995		1997		1998	
	Writers	Pub.	Writers	Pub.	Writers	Pub.
Alicia Carolyn Evelyn	0.000614%	N/A	0.000130%	N/A	0.000144%	N/A

73. The Settling Parties have introduced evidence of the universe of total sales of song titles during the relevant years. Furthermore, the Settling Parties have demonstrated that they represent virtually all songwriters and music publishers; and that they represent all claims other than those of Mr. Curry and Ms. Evelyn. The Settling Parties are entitled to all royalties other than those apportioned to Mr. Curry and Ms. Evelyn that will be distributed.

74. Mr. Curry and Ms. Evelyn have challenged the ability of the Settling Parties to represent all other claimants to DART royalties in this and the prior proceeding. *See* Rebuttal Case of A. Evelyn at ¶¶ 1-9; Direct Case of E. Curry at 2. The Settling Parties filed claims, qualify as "interested copyright parties," under 17 U.S.C. § 1001(7), settled with all other claimants to the 1995, 1996, 1997 and 1998 DART Musical Works Funds, as is encouraged by the Copyright Act, and represent all other claimants in this proceeding.<sup>15</sup> The Librarian has found that there was ample evidence to support the fact that the Settling Parties represented all other claimants to DART royalties. *See* 62 Fed.Reg. at 6561; *see also* Order, Determination of the Distribution of the 1991 Cable Royalties in the Music Category, 63 Fed.Reg. at 20430.

<sup>15</sup> The Settling Parties have obtained separate specific and written authorizations from members or affiliates expressly authorizing representation for the purpose of collecting DART royalties in accordance with Office rules, under C.F.R. § 259.2(c).

75. Lists for all of the individual songwriters and music publishers represented by the Settling Parties in this proceeding were filed with the claim of each individual Settling Party in the Office for each year. See 37 C.F.R. § 259.3(d) (1997) (Copyright Office regulations for filing DART claims state that "if the claim is a joint claim, it shall include . . . the name of each claimant to the joint claim"). The lists contain the number of claimants represented by the Settling Parties and are in the public records of the Office, available for inspection by the public, and constitute part of the record in this proceeding.

76. To require that all claimants in a given distribution proceeding prove their entitlement through detailed data of every individual work has been repudiated as wasteful. In National Association of Broadcasters v. Copyright Royalty Tribunal, 772 F.2d 939 (D.C. Cir. 1985), the appellate court that generally reviews CRT and Librarian decisions observed: "[w]e would effectively eliminate the likelihood for settlements if we accepted the . . . contention that when one claimant - - no matter how modest that claimant's likely share under even the most sanguine review - - chooses not to settle with the other claimants, all awards would thereby be in controversy and a full hearing on all claims would be required. Past history suggests that at least one claimant will in any given proceeding feel sufficiently aggrieved to upset the settlement apple cart."

**E. The Settling Parties Are Entitled to Incorporate by Reference and to Rely On A Previous Decision of the Librarian Involving the Same Two Individual Claimants.**

77. The Settling Parties have the opportunity to incorporate by reference their direct case from the '92-94 royalty distribution proceeding under the AHRA, including complete testimony. 37 C.F.R. § 251.43. They have done so. The Settling Parties are

entitled to ask the Panel to act on the basis of prior panel decisions and rulings of the Librarian, under 17 U.S.C. § 802(c) and have done so. *See* Order, Determination of the Distribution of the 1991 Cable Royalties in the Music Category, Docket No. 94-3 CARP CD 90-92, 63 Fed.Reg. at 20432 ("only prior CARP and Copyright Royalty Tribunal decisions and rulings of the Librarian have precedential value").

78. The Librarian and the panel in the previous proceeding, which also involved Mr. Curry and Ms. Evelyn, determined that the methodology for determining distribution of Musical Works Funds as presented by the Settling Parties was "logical and consistent." The same methodology has been applied in this proceeding. *Id.*

79. Upon a petition for review in the U.S. Court of Appeals for the D.C. Circuit, the Court found that the "Librarian" had offered "a facially plausible explanation bearing a rational relationship to the record evidence." Curry v. Librarian of Congress, 1998 U.S.App. LEXIS 28476 (D.C.Cir., Feb. 4, 1998), *cert. denied sub nom Cannings v. Librarian of Congress, Evelyn v. Librarian of Congress*, 527 U.S. 1058 (1999), *petition for reh'g of denial of cert. denied*, 527 U.S. 1058 (1999); Accord: Cannings v. Librarian of Congress, et. al., 1999 U.S.App. LEXIS 3976 (D.C.Cir. March 2, 1999).

80. In this proceeding, Mr. Curry and Ms. Evelyn have not shown changed circumstances nor new evidence of a material nature that would warrant a rejection of the Settling Parties' record evidence, and the precedent that undergirds it. This panel must act "on the basis of a fully documented written record." 17 U.S.C. § 802(c). Therefore, evidence of disputes concerning other matters are irrelevant to this or any distribution determination.

## ALLOCATION

81. Based on the credible record evidence, the Panel concludes that the Musical Works Funds, Writers and Publishers Subfunds for 1995, 1996, 1997 and 1998, should be allocated as follows:

To Mr. Curry: 0.001966% of both the Writers and Publishers Subfunds in 1995; and 0.001027% of both the Writers and Publishers Subfunds in 1997.

To Ms. Evelyn: 0.000614% of the Writers Subfund in 1995; 0.000130% of the Writers Subfund in 1997 and 0.000144% of the Writers Subfund in 1998.

To the Settling Parties: 99.997420% of the Writers Subfund and 99.998034% of the Publishers Subfund in 1995; 99.998843% of the Writers Subfund and 99.998973% of the Publishers Subfund in 1997; and 99.999856% of the Writers Subfund in 1998.

Respectfully submitted,

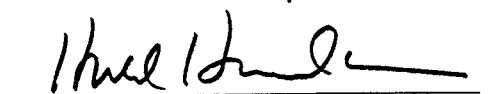
Arbitration Panel



Cheryl I. Niro  
Chairperson



John B. Farmakides  
Arbitrator



Harold Himmelman  
Arbitrator

Dated: November 9, 2000

and (4) the filing of written submissions by parties to the investigation.

The Commission expects to reach a determination in this proceeding without conducting a public hearing or delegating the proceeding to an administrative law judge for a hearing and a recommended determination.

All nonconfidential documents filed in the investigation, listed in the Commission Order issued along with this notice, or filed in the modification proceeding are or will be made available for public inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Commission's Office of the Secretary, Dockets Branch, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202- 205- 1802.

In addition, the Commission Order issued along with this notice, Littelfuse's written report, the Commission investigative staff's written comments on that report, and all nonconfidential documents filed in the modification proceeding will be available for inspection on the Commission's website. To access them from the Home Page of the Commission's Internet server, click on "EDIS ON- LINE," click on "337" under "Home," click on "337 114 Violation Miniature Plug-In Blade Fuses," and then click on the specific document to be reviewed.

*Written Comments.* Interested persons who are not parties to the investigation may file written comments on (1) the conditions of fact or law and the public interest reasons set forth in the Commission Order of January 30, 2001, that prompted the Commission to institute the proceeding, (2) the specific modification that the Commission is contemplating, and (3) any other issues that will aid the Commission in determining whether to modify the trade dress/product configuration provision of the exclusion order. Such comments must be filed in accordance with the Commission's Rules of Practice and Procedure, particularly the relevant provisions of 19 CFR 201.6, 201.8 (except for the number of copies prescribed by 201.8(d)), 201.14, 201.16, and 210.4 through 210.7.

Issued: February 1, 2001.

By Order of the Commission.

**Donna R. Koehnke,**  
Secretary.

[FR Doc. 01- 3195 Filed 2- 6- 01; 8:45 am]

BILLING CODE 7020-02-P

## INTERNATIONAL TRADE COMMISSION

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** February 12, 2001 at 2 p.m.

**PLACE:** Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205- 2000.

**STATUS:** Open to the public.

#### MATTERS TO BE CONSIDERED:

1. Agenda for future meeting: none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 701- TA- 413 and 731- TA- 913- 918 (Preliminary) (Stainless Steel Bar from France, Germany, Italy, Korea, Taiwan, and the United Kingdom)- briefing and vote. (The Commission is currently scheduled to transmit its determination to the Secretary of Commerce on February 12, 2001; Commissioners' opinions are currently scheduled to be transmitted to the Secretary of Commerce on February 20, 2001.)

5. Outstanding action jackets:
  - (1) Document No. EC- 01- 003: Approval of final report in Inv. No. 332- 413 (The Economic Impact of U.S. Sanctions with Respect to Cuba).
  - (2) Document No. ID- 01- 001: Approval of study coverage, objectives, methodology, travel requirements, annotated outline, and revised staffing plan and work schedule in Inv. No. 332- 423 (The Effects of EU Policies on the Competitive Position of the U.S. and EU Horticultural Products Sector).

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: February 2, 2001.

By order of the Commission:

**Donna R. Koehnke,**  
Secretary.

[FR Doc. 01- 3331 Filed 2- 5- 01; 3:13 pm]

BILLING CODE 7020-02-U

## INTERNATIONAL TRADE COMMISSION

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** February 13, 2001 at 11 a.m.

**PLACE:** Room 101, 500 E Street SW., Washington, DC 20436 Telephone: (202) 205- 2000.

**STATUS:** Open to the public.

#### MATTERS TO BE CONSIDERED:

1. Agenda for future meeting: none.
  2. Minutes.
  3. Ratification List.
  4. Inv. Nos. 701- TA- 355 and 731- TA- 659- 660 (Review) (Grain-Oriented Silicon Electrical Steel from Italy and Japan)- briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on February 23, 2001.)
  5. Outstanding action jackets:
    - (1) Document No. EC- 01- 003: Approval of final report in Inv. No. 332- 413 (The Economic Impact of U.S. Sanctions with Respect to Cuba).
    - (2) Document No. ID- 01- 001: Approval of study coverage, objectives, methodology, travel requirements, annotated outline, and revised staffing plan and work schedule in Inv. No. 332- 423 (The Effects of EU Policies on the Competitive Position of the U.S. and EU Horticultural Products Sector).
- In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: February 2, 2001.

By order of the Commission:

**Donna R. Koehnke,**  
Secretary.

[FR Doc. 01- 3332 Filed 2- 5- 01; 3:13 pm]

BILLING CODE 7020-02-U

## LIBRARY OF CONGRESS

### Copyright Office

[Docket No. 99-3 CARP DD 95-98]

### Distribution of 1995, 1996, 1997, and 1998 Digital Audio Recording Technology Royalties

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Distribution Order.

**SUMMARY:** The Librarian of Congress, upon the recommendation of the Register of Copyrights, is adopting the determination of the Copyright Arbitration Royalty Panel ("CARP") and issuing an order announcing the allocation of the royalty fees in the 1995, 1996, 1997, and 1998 Musical Works Funds. These fees are paid to the Copyright Office by importers and manufacturers of Digital Audio Recording Devices and Media ("DART") who distribute these products in the United States.

**EFFECTIVE DATE:** The percentages announced in this Order are effective as of February 7, 2001.



**ADDRESSES:** The full text of the CARP's report to the Librarian of Congress is available for inspection and copying during normal business hours in the Office of the General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, SE, Washington, DC, 20559-6000.

**FOR FURTHER INFORMATION CONTACT:** David O. Carson, General Counsel, or Tanya M. Sandros, Senior Attorney, Copyright Arbitration Royalty Panel ("CARP"), PO Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 252-3423.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Audio Home Recording Act of 1992, Public Law No. 102-563, requires manufacturers and importers of digital audio recording devices and media which are distributed in the United States to pay royalty fees to the Copyright Office. Upon receipt, the Copyright Office deposits these fees with the Treasury of the United States. 17 U.S.C. 1005.

Interested copyright parties must file a claim to these fees each year during January and February to establish their entitlement to a portion of the funds. How these funds are distributed to the various interested copyright parties is decided either by the parties or by Order of the Librarian, following a distribution proceeding conducted by a Copyright Arbitration Royalty Panel ("CARP"). 17 U.S.C. 1007.

On May 4, 1999, the Copyright Office requested comments from the interested copyright parties as to the existence of controversy concerning the distribution of the DART royalty fees in the 1995, 1996, 1997 and 1998 Musical Works Funds, and notices of intent to participate in any proceeding to determine the distribution of these funds. In addition, the Office announced that it was consolidating the consideration of the distribution of the 1995-1998 Musical Works Funds into a single proceeding in order to have sufficient funds to cover the cost of an arbitration proceeding. 64 FR 23875 (May 4, 1999).

Ten parties filed comments on the existence of controversies and notices of intent to participate in this proceeding: Broadcast Music, Inc. ("BMI"); the American Society of Composers, Authors and Publishers ("ASCAP"); SESAC, Inc. ("SESAC"); the Harry Fox Agency ("HFA"); the Songwriters Guild of America ("SGA"); and Copyright Management, Inc. ("CMI") (collectively, the "Settling Parties"); Carl

DeMonbrun/Polyphonic Music, Inc. ("DeMonbrun"); James Cannings/Can Can Music ("Cannings"); Alicia Carolyn Evelyn ("Evelyn"); and Eugene "Lampchops" Curry/Tajai Music, Inc. ("Curry").

Prior to the commencement of the proceeding, Cannings and DeMonbrun notified the Office that they had settled their claims with the Settling Parties and that they were withdrawing from the proceeding. See Notices of Settlement and Withdrawals of Claims in Docket No. 99-3 DD 95-98 (dated November 10, 1999). This settlement resolved the remaining controversy over the distribution of the 1996 Musical Works Funds and left Evelyn's claim to a share of the royalty fees in the 1995, 1997 and 1998 Writer's Subfunds and Curry's claim to a share of the royalty fees in both the 1995 and 1997 Writer's and Publisher's Subfunds to be determined.

Each of the three participants filed his or her direct case with the Office on November 15, 1999, commencing the 45-day precontroversy discovery period. In addition, the Settling Parties filed a motion to dispense with formal hearings and to conduct the proceeding on the basis of written pleadings alone and a motion for full distribution of those funds not in controversy and a partial distribution of all remaining DART royalties.

The Copyright Office granted the motion for a full distribution of those royalty fees that were no longer in controversy and granted in part the request for a partial distribution of the remaining funds. See Order in Docket No. 99-3 CARP DD 95-98 (December 22, 1999). However, the Office did not rule on the motion to dispense with formal hearings, choosing instead to designate the issue to the CARP. *Id.*

On April 10, 2000, the Copyright Office announced the names of the three arbitrators chosen for this proceeding and the initiation of the 180-day arbitration period in a *Federal Register* notice. 65 FR 19025 (April 10, 2000). Shortly thereafter, the Chairperson of the panel resigned due to a perceived conflict of interest. Consequently, the Office suspended the 180-day period from May 16, 2000, until June 16, 2000, and a new chairperson was selected during this period in accordance with 37 CFR 251.6(f).

The first meeting between the parties and the arbitrators took place on June 19, 2000. The purpose of this initial encounter was to set the schedule for the proceeding and to resolve the two remaining procedural issues: whether to grant the Settling Parties' motion to suspend formal hearings and proceed on

the basis of the formal record only and whether to allow the filing of a written rebuttal case. The CARP heard oral argument from the parties on these issues that day; and based upon these hearings, the Panel decided "to waive the requirement of oral evidentiary hearings, to proceed upon the written record alone, and to permit the filing of written rebuttal cases." CARP Report, ¶ 24. See Order in Docket No. 99-3 CARP DD 95-98 (June 19, 2000). The Panel delivered its final report to the Copyright Office on November 9, 2000.

##### The Panel's Report

Based upon the evidence offered in the written record, the Panel determined that the royalties in the 1995, 1997, and 1998 Musical Works Funds should be distributed as follows:

To Mr. Curry: 0.001966% of both the 1995 Writers and Publishers Subfunds; and 0.001027% of both the 1997 Writers and Publishers Subfunds.

To Ms. Evelyn: 0.000614% of the 1995 Writers Subfund; 0.000130% of the 1997 Writers Subfund and 0.000144% of the 1998 Writers Subfund.

To the Settling Parties: 99.997420% of the 1995 Writers Subfund and 99.998034% of the 1995 Publishers Subfund; 99.998843% of the 1997 Writers Subfund and 99.998973% of the 1997 Publishers Subfund; and 99.999856% of the 1998 Writers Subfund.

As in the prior proceeding to determine the distribution of the 1992-1994 Musical Works Funds, the CARP adopted the Settling Parties' methodology which gives Curry and Evelyn a share of the royalty fees from a particular subfund based upon the percentage of their song titles sold during the relevant time period. The Settling Parties receive all remaining royalty fees because they represent the interests of the remaining copyright owners entitled to receive a portion of these funds.

##### Standard of Review

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." The Librarian of Congress has discussed his narrow scope of review in great detail in prior decisions and concluded that the use of the term "arbitrary" in this provision is no different than the "arbitrary" standard described in the Administrative Procedures Act, 5 U.S.C. 706(2)(A). See 63 FR 49823 (September 18, 1998); 63 FR 25394 (May 8, 1998); 62 FR 55742

(October 28, 1997); 62 FR 6558 (February 12, 1997); 61 FR 55653 (October 28, 1996). Thus, the standard of review adopted by the Librarian is narrow and provides that the Librarian will not reject the determination of a CARP unless its decision falls outside the "zone of reasonableness" that had been used by the courts to review decisions of the Copyright Royalty Tribunal. See *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 724 F.2d 176, 182 (D.C. Cir. 1983). Moreover, based on a determination by the Register and the Librarian that the Panel's decision is neither arbitrary or contrary to law, the Librarian will adopt the CARP's determination even if the Register and the Librarian would have reached conclusion different from the conclusions reached by the CARP.

The U.S. Court of Appeals for the District of Columbia has stated, however, that the Librarian would act arbitrarily if "without explanation or adjustment, he adopted an award proposed by the Panel that was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award." See *National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 923 (D.C. Cir. 1998).

For this reason, the Panel must provide a detailed rational analysis of its decision, setting forth specific findings of fact and conclusions of law. See *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1091 (D.C. Cir. 1992), (requiring Copyright Royalty Tribunal to weigh all relevant considerations and set out its conclusions in a form that permits the court to determine whether it has exercised its responsibilities lawfully).

It is then the task of the Register to review the Panel's report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether and in what manner, the Librarian should substitute his own determination.

## Review of the CARP Report

### a. Determination of the Panel

The Panel found that the Settling Parties are entitled to 100% of the funds in the 1995, 1996, 1997, and 1998 Musical Works Funds minus the amount owed to Curry and Evelyn. The methodology used to determine Curry's and Evelyn's shares is identical to the method used to determine the distribution of the 1992, 1993, and 1994 Musical Works Funds in an earlier proceeding. See 62 FR 6558 (February 12, 1997). It is a simple arithmetic

calculation which determines each individual claimant's share by calculating the number of song titles credited to the claimant and sold in year X and dividing that figure by the total number of song titles sold that year. This computation represents the claimant's proportionate share of the total royalties in year X.

The Panel adopted the Settling Parties' formula, in part, because Curry and Evelyn, while objecting to the use of this same formulation, failed to offer any alternative systematic method or formula for calculating each party's share of the royalties. CARP Report ¶¶ 38, 59. Instead, both Curry and Evelyn suggested that each of them is entitled to 1% of the royalty fees collected for any year to which they filed a claim. The Panel rejected this proposal because it fails to explain why two individual claimants are entitled to 1% of the annual funds when the total claimant pool numbers in the thousands. "If each of the thousands of claimants represented in this proceeding were to receive 1% of the DART royalties available for distribution, the total claimed would quickly exceed 100%." CARP Report ¶ 59.

Evelyn and Curry, however, do not accept the Settling Parties' contention that they represent thousands of claimants, arguing in their respective filings that the organizations and associations comprising the Settling Parties cannot represent individual claimants and act as their agent in these proceedings. See Curry's Direct Cast at 2; Evelyn's Rebuttal Case at ¶¶ 1-9; Evelyn Petition at 1-2.

The Panel considered these allegations and found that the Settling Parties are "interested copyright parties," pursuant to 17 U.S.C. 1001(7) and may act as agents for their members. CARP Report ¶ 74. The Panel noted that an agency relationship is established for the purpose of a DART proceeding when an association or organizations files a DART claim on behalf of its members in accordance with § 259.2(c) of the Copyright Office rules. This provision requires an organization or association, which acts as a common agent on behalf of the members of its organization, to obtain separate, specific and written authorization from each of its members or affiliates in order to file a DART claim; and it further requires that each claim list the name of each individual songwriter and music publisher on whose behalf the organization is filing its claim. CARP Report ¶ 75; see also, 37 CFR 259.2(c) and 259.3(d). Based on these written expressions of the agency relationship,

the CARP found that each of the Settling Parties has the authority to act as an agent for the members listed in the claims.

The CARP then examined the record evidence and the Settling parties' formula for calculating Evelyn's and Curry's share. First, it considered the Settling Parties' use of SoundScan data to establish the universe of record sales for each year, including testimony from Michael Fine, co-founder and chief executive of SoundScan. It weighted Fine's testimony, which identified Sound Scan as a premier independent online information system that tracks music sales throughout the United States, against challenges from Evelyn and Curry, who argued that the SoundScan data was incomplete because it did not include record club, computer and foreign sales figures. CARP Report ¶¶ 32-33, 62. It found that Evelyn and Curry were correct to conclude that inclusion of such data would indeed increase their total record sales, but went on to note that it would also increase the total record sales figures for other claimants. It then accepted the Settling Parties' conclusion that adding to the universe of sales would in all likelihood decrease the amount of Evelyn's and Curry's awards. CARP Report ¶ 62. The Panel also rejected Curry's and Evelyn's assertion that the total record sales figures should be adjusted to include foreign record sales because it determined that such sales are not compensable under the Audio Home Recording Act. CARP Report ¶ 62. Furthermore, and more importantly, the CARP found that neither Curry nor Evelyn offered an alternative mechanism to use of the SoundScan data for figuring out how many records sales occurred. CARP Report ¶¶ 50-53, 62, 68-69. Thus, finding not other basis for determining the universe of total record sales in the written record, the Panel accepted the testimony of Michael Fine and his methodology for determining the total number of record sales in any given year. CARP Report ¶ 33.

Next, the Panel scrutinized the evidence used to determine the number of record sales of Curry's and Evelyn's works. First, it found that Curry and Evelyn had submitted no evidence into the record of either record sales or performances of their works. This meant that the Settling Parties offered the only evidence on the number of record sales garnered by these claimants. CARP Report ¶¶ 64-65, 70. To make this determination, the Settling parties first identified the names of the record titles to which Curry and Evelyn have a claim for purposes of this proceeding by

reference to the list of titles identified for each claimant in the prior DART distribution proceeding, see Panel's Report in Docket No. 95- 1 CARP DD 92- 94 at ¶¶ 34, 35, the songs listed on the DART claims, and by conducting a search of the allmusic.com website.<sup>1</sup> Next, the Settling Parties identified the albums and singles which included these works by searching these titles in Phonolog, an industry standard directory that lists all records, CDs, cassettes, albums and singles issued in the United States. CARP Report ¶¶ 38- 40. Once the titles were identified, it was a simple matter to use the SoundScan data to determine the number of unit sales per work for each year in controversy. CARP Report ¶¶ 44- 47.

The CARP found that the evidence introduced by the Settling Parties identifying and quantifying the works of Evelyn and Curry was the only credible evidence in the record upon which to make a determination. CARP Report ¶¶ 63- 72. In fact, the Panel found that the Settling Parties credited Evelyn and Curry with more than their actual percentage entitlement because no adjustment was made to reflect the co-authorship or co-publication of certain works. CARP Report ¶ 63. Thus, it adopted the evidence and conclusions offered by the Settling Parties and based its determination of Evelyn's and Curry's shares of the royalty fees on the Settling Parties' methodology. The CARP did so with full knowledge that the methodology had been used in the previous DART distribution proceeding and found to be "logical and consistent" by the Librarian of Congress and reviewed with approval by the United States Court of Appeals for the District of Columbia. CARP Report ¶¶ 78- 79.

#### *b. Petitions To Modify or Set Aside the Panel's Determination*

1. *Evelyn's Petition:* Section 251.55(a) of the rules provides that "[a]ny party to the proceeding may file with the Librarian of Congress a petition to modify or set aside the determination of a Copyright Arbitration Royalty Panel within 14 days of the Librarian's receipt of the panel's report of its determination." 37 CFR 251.55(a). Replies to petitions to modify are due 14 days after the filing of the petitions. 37 CFR 251.55(b).

Section 251.55 of the rules assists the Register of Copyrights in making her recommendation to the Librarian, and the Librarian in conducting his review

of the CARP's decision by allowing the parties to the proceeding to raise specific objections to a CARP's determination. As required by section 802(f) of the copyright Act, if the Librarian determines that the Panel in this proceeding has acted arbitrarily or contrary to the provisions of the Copyright Act, he must "after full examination of the record created in the arbitration proceeding, issue an order setting the \* \* \* distribution of fees." 17 U.S.C. 802(f).

Evelyn, who appeared pro se in this proceeding on behalf of herself, filed a petition to modify. Her petition attacks the Panel's report on three basic points. First, as a threshold issue, she claims that the entities comprising the Settling Parties, particularly the performing rights organizations and Gospel Music Coalition, have not properly filed claims to the DART royalties on behalf of their members. Evelyn Petition at 1- 3. Second, she argues that the Panel disregarded statements and evidence offered by herself and Curry which contested and disproved the Settling Parties' findings of fact and conclusions of law. *Id.* at 4- 5, 8. And third, she lists a number of perceived procedural irregularities that she claims led to disparate treatment of the individual claimants: (1) Acceptance by the Office of the Settling Parties' direct case which she asserts was not filed in accordance with the governing regulations; (2) return of her rebuttal case which was submitted during the 45-day precontroversy discovery period; and (3) failure of the CARP to request additional information from her to substantiate her claim. *Id.* at 5- 6, 8.

Curry, the other individual claimant participating in this proceeding, did not file a petition to modify.

2. *Settling Parties' Reply to Evelyn Petition to Modify:* Settling Parties oppose the Evelyn petition on both procedural and substantive grounds. They contend that the petition is substantively deficient because it does not demonstrate in what way the CARP report is either arbitrary or contrary to law- the standard of review to be used by the Librarian in his review of the Panel's report. See 17 U.S.C. 802(f). In making this point, the Settling Parties addresses each of the legal issues raised by Evelyn.

The Settling Parties also argue that the Librarian should reject Evelyn's petition because it fails to reference applicable sections of her proposed findings of fact and conclusions of law, as required under § 251.55(a) of title 37 of the Code of Federal Regulations. They argue that failure to correctly reference her filings shows an apparent willful disregard for

the requirements of the rule and warrants dismissal of the Petition. Settling Parties' Reply at 11- 12.

#### *3. Sufficiency of Evelyn's Petition:*

Before the Register can address the issues raised by Evelyn's petition to modify the determination of the Panel, the Register must first address the Settling Parties' argument that the petition warrants dismissal for failure to comply with § 251.55(a) of the CARP regulations. That section provides that each petition must "state the reasons for modification or reversal of the panel's determination, and shall include applicable sections of the party's proposed findings of fact and conclusions of law." 37 CFR 251.55(a).

The purpose of this requirement is to enable the Register and the Librarian to locate those portions of the testimony and filings that support a party's petition. Absent a showing of bad faith, the remedy for failure to comply with the regulation is an order from the Register, directing the offending party to amend his or her petition and include the proper citations to the relevant sections of the party's proposed findings of fact and conclusions of law. See 62 FR 6560 (February 12, 1997).

The Settling Parties point out that Evelyn had encountered the rule in the previous proceeding to determine the distribution of the 1992- 1994 DART royalty fees and argue that her "apparent willful disregard for the requirements imposed by Rule 251.55 warrants dismissal of the Petition." Settling Parties' Reply at 12.

While it is clear that Evelyn does not provide all relevant references to her proposed findings of fact and conclusions of law, she did make a good faith effort to comply with the regulation and supplied citations to the Settling Parties' Direct Case, the CARP Report and her own proposed findings of fact and conclusions of law. See e.g., Evelyn Petition at pp. 2, 5, 7. Moreover, the Library will accept a less than perfectly executed petition without amendment where the record is small, and it is reasonably easy to locate the cited information in the record. See 62 FR 6561 (February 12, 1997). Thus, Evelyn's petition has received full consideration.

#### *c. The Register's Review and Recommendation*

The statutory criteria to be considered when deciding how to distribute the DART royalties are set forth in section 1006(c)(2) of the Copyright Act, title 17 of the United States Code. It states that a CARP may only consider "the extent to which, during the relevant period \* \* \* each musical work was

<sup>1</sup> This website provides public access to a comprehensive database of information regarding recording artists, albums, and songs.

distributed in the form of digital musical recordings \* \* \* or disseminated to the public in transmissions." In the first proceeding to determine the distribution of DART royalties, the Panel found, and the Library agreed, that the statute does not require the application of both criteria when evidence as to only one of the criteria has been presented by the parties to the proceeding. 62 FR 6561 (February 12, 1997). This determination established a precedent for the presentation of and reliance on sales data alone for the purpose of determining each claimant's share of the royalty fees.

Evelyn argues in her petition to modify that the first proceeding did not establish a binding precedent for all future distribution proceedings, but fails to offer an alternative approach or explain why the Panel should deviate from the methodology used in the first proceeding when the record evidence parallels the prior record in its approach. Every Petition at 7. Her assertion about the precedential effect of the first proceeding is not correct. Section 802(c) requires the Panel to "act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration Panel determinations, and rulings by the Librarian of Congress under section 801(c)."

Had Evelyn offered evidence of public performances or evidence for ascertaining the scope of record sales in a different manner, the CARP could have adopted a different methodology for making the determinations. However, an assertion that she is entitled to 1% of the royalty fees in the funds to which she filed a claim is not evidence. See Proposed Distribution Order, Evelyn Proposed Findings of Fact and Conclusions of Law. It is merely a statement of opinion.

Evelyn party has an opportunity to present evidence to the Panel when it files the direct case. The written direct case is the very foundation of a party's case and as such must include testimony and exhibits which, when taken together, support and prove a party's claim. See Order in Docket No. 95- 1 CARP DD 92- 94 (dated May 9, 1996). In Evelyn's case, she supplied only a list of her works. See Evelyn Direct Case, exhibit 1a- 1d; CARP Report ¶169. Evidently, she had thought the CARP would request additional information and evidence from her at a later date. Evelyn Petition at 8; Settling Parties' Reply at 8. While a CARP member may, in accordance with the regulations, request additional

information from a party, he or she does so at his or her own discretion. See 37 CFR 251.46(d). It is not the function of the Panel to search for new evidence that favors a party's case. This is and remains each party's prime responsibility throughout the proceeding.

In the current proceeding, the arbitrators chose not to request any additional information, evidently finding the evidence in the record sufficient upon which to make an informed decision. Because the Settling Parties offered the same type of evidence as that adopted in the prior DART distribution proceeding and neither Evelyn or Curry made a showing of changed circumstances or presented material evidence<sup>2</sup> that would justify a rejection of the Settling Parties' evidence, the Panel's decision to follow the precedent is neither arbitrary nor contrary to law.

Evelyn also asserts, as a threshold matter, that the performing rights organizations had no authority to file a claim on behalf of their members. The Panel discussed this issue fully in its report and found that each of the organizations and associations that comprise the Settling Parties meet the definition of "interested copyright party" and are entitled to file a claim on behalf of its members and represents their interests in a CARP proceeding. See, *supra*, discussion in Determination of the Panel. This reasoning fully complies with the Copyright Act, and therefore, the participation of the members of the Settling Parties, including the performing rights organizations, is not arbitrary.

Evelyn also asserts that Gospel Music Coalition ("GMC") failed to file a claim and therefore, cannot be represented by the Settling Parties. This assertion is clearly erroneous. A review of the Copyright Office records shows that GMC filed claims to the 1995, 1996, 1997 and 1998 Musical Works Funds and did so in both subfunds. See, claim no. 7, 1995 Publishers Subfund and claim no. 8, 1995 Writers Subfund; claim no. 9, 1996 Publishers Subfund and claim no. 7, 1996 Writers Subfund; claim no. 8, 1997 Publishers Subfund and claim no. 9, 1997 Writers Subfund; claim no. 8, 1998 Publishers Subfund and claim no. 8, 1998 Writers Subfund. Based upon the proper filing of these claims, GMC was then free to negotiate

<sup>2</sup> Evelyn claims that an increase in the number of songs for which she is making a claim constitutes changed circumstances and should alter the outcome of the CARP's decision. Evelyn Petition at 8. However, there is no evidence in the record documenting sales of these works during the relevant period. CARP Report ¶169.

a settlement agreement with the other parties who filed a claim to the same funds. 17 U.S.C. 1007(a)(2). This it did. On July 2, 1999, the Copyright Office received official notification that Gospel Music Coalition had reached an agreement to settle its claims to the 1995, 1996, 1997, and 1998 Musical Works Funds with respect to the Writers and Publishers Subfunds. See, Comments on the existence of controversies and notice of intent to participate of Broadcast Music, Inc., the American Society of Composers, Authors & Publishers, SESAC, Inc., The Harry Fox Agency, Inc., The Songwriters Guild of America and Copyright Management, Inc. as Settling Parties, Docket No. 99- 3 CARP DD 95- 98, at 3. Consequently, Evelyn's suggestion that GMC improperly reached an agreement with the Settling Parties is incorrect.

Another point Evelyn makes in her petition is that she received disparate treatment in this proceeding because of procedural irregularities. First, she argues that the Settling parties failed to submit their direct case in accordance with the CARP regulations. Section 251.45(b)(1)(i) of the rules requires that "each party to the proceeding must effect actual delivery of a complete copy of its written direct case on each of the other parties to the proceeding no later than the first day of the 45-day period." In this proceeding, parties were directed to deliver copies of their direct cases to all parties on November 15, 1999. Evelyn, however, received her copy of the Settling Parties' direct case by special messenger at 3:30 a.m. on November 16, 1999, along with three additional motions.<sup>3</sup> Evelyn Petition at 5.

The Panel's response to this issue was incorrect as a matter of law. It stated that the CARP rules do not require that each party receive pleadings simultaneously, citing § 251.44(f). See CARP Report ¶19 n.5. The Panel failed to recognize that § 251.45(b) of the CARP rules governs the filing of a direct case and specifically requires filing of direct cases to all parties on the same day. This misinterpretation, however, does not require that the Librarian set aside the entire decision or strike the Settling Parties' case because Evelyn never requested relief from the Copyright Office. Had Evelyn wished to contest the filing of the Settling Parties' direct case, she had only to file a motion with the Office seeking dismissal of the

<sup>3</sup> Meanwhile, the Settling Parties had filed its direct case with the Copyright Office on November 15, 1999, in accordance with the Office's scheduling order.

Settling Parties' case or requesting an adjustment to the discovery schedule to make up for the lost time. She chose not to file such a motion, however, because she believed that "the Copyright Office would (not) strike the case of the Settling Parties and leave only the two individual claimants in the case." Evelyn's Proposed Findings of Fact and Conclusions of Law at 3. Consequently, the Office had no reason to address the issue because Evelyn did not request any relief from the Office at the appropriate time. Furthermore, her continued involvement in the proceeding supports the Panel's conclusion that she did not suffer any undue harm because of the delay in the delivery of the direct case.

Another procedural irregularity raised by Evelyn concerns the return of her rebuttal case. She filed it with the Copyright Office on November 24, 1999, during the 45-day precontroversy discovery period. By Order, dated November 24, 1999, the Office rejected the pleading except for a single sentence which addressed a motion for a partial distribution then under consideration. The Order stated that "[n]o provision is made in the rules or the Library's scheduling order for the filing of rebuttal cases at this stage of the proceeding. Rebuttal cases, if required at all, are filed with the CARP after consideration of the written direct cases." Evelyn refiled her rebuttal case on July 28, 2000, and it was considered by the CARP at that time. Consequently, Evelyn suffered no prejudice from the Office's decision to strike her rebuttal case when it was first filed prematurely.

Evelyn makes one additional procedural challenge in her petition. She contends that the Settling parties did not provide sworn testimony to establish a universe of sales. Evelyn Petition at 8. Specifically, she objects to the inclusion of Michael Fine's prior testimony from the 1992- 1994 DART distribution proceedings on the SoundScan data. This testimony established the basis for determining total record sales and record sales for Curry and Evelyn. CARP Report ¶ 32. She states that there were problems with his testimony in the 1992- 1994 DART distribution proceedings but does not discuss what these problems were or why they have a bearing on the current proceeding. In any event, no problem was identified in the last proceeding concerning this testimony; thus, under the CARP rules, the Settling Parties were free to designate a portion of past records to be included in their direct case. 37 CFR 251.43. Had the Panel not allowed the incorporation of Fine's past testimony, it would have acted contrary

to the law, unless it had reason to strike the testimony for good cause shown.

Evelyn's final challenge focuses on the Settling Parties' methodology. She, like Curry before her in the 1992- 1994 DART distribution proceeding, objects to the use of a methodology that only requires a showing of the number of record sales for the individual claimants. She contends that no claim can be termed a "de minimus claim" until it is measured against the entitlement of others. Evelyn Petition at 3. In response, the Panel noted that the courts have repudiated as wasteful a requirement that all claimants in a given distribution proceeding prove their entitlement through the presentation of detailed data for every individual work. CARP Report ¶ 76. In *National Association of Broadcaster v. Copyright Royalty Tribunal*, 772 F.2d 922, 939 (D.C. Cir. 1985), the case cited by the Panel in its report, the court wisely noted that to do otherwise would effectively eliminate the likelihood of settlements because a single claimant—no matter how modest that claimant's likely share under even the most sanguine review—could choose not to settle with the other claimants and require a full hearing on all claims, even those not in controversy.

For all the reasons set forth in the prior discussion, the Register concludes that the Panel did not act arbitrarily or contrary to the provisions of the Copyright Act in determining the value of Curry's and Evelyn's DART claims and recommends that the Librarian adopt without amendment the Panel's Report and recommendation for the allocation of the 1995, 1997 and 1998 Musical Works Funds.

#### Order of the Librarian of Congress

Having duly considered the recommendation of the Register of Copyrights regarding the report of the Copyright Arbitration Royalty panel concerning the distribution of the 1995, 1997 and 1998 Musical Works Funds, the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing an order announcing the allocation of the royalty fees in the 1995, 1997 and 1998 Musical Works Funds.

Wherefore, it is ordered that the royalty fees in the 1995, 1997 and 1998 Musical Works Funds shall be distributed according to the following percentages:

	1995	
	Writers (%)	Publishers (%)
Curry .....	0.001966	0.001966
Evelyn .....	0.000614	N/A
Settling parties .....	99.997420	99.998034
Total .....	100.00	100.00

	1997	
	Writers (%)	Publishers (%)
Curry .....	0.001027	0.001027
Evelyn .....	0.000130	N/A
Settling parties .....	99.998843	99.998973
Total .....	100.00	100.00

	1998	
	Writers (%)	Publishers (%)
Curry .....	N/A	N/A
Evelyn .....	0.000144	N/A
Settling parties .....	99.999856	100.00
Total .....	100.00	100.00

As provided in 17 U.S.C. 802(g), the period for appealing this Order to the United States Court of Appeals for the District of Columbia is thirty (30) days from the effective date of this Order.

Dated: January 30, 2001.

Marybeth Peters,  
Register of Copyrights.

Approved by:

James H. Billington,  
The Librarian of Congress.

[FR Doc. 01- 3142 Filed 2- 6- 01; 8:45 am]

BILLING CODE 1410-33-P

#### NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

##### Privacy Act of 1974; Transfer of Records

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Notice of transfer of records subject to the Privacy Act to the National Archives.

**SUMMARY:** Records retrievable by personal identifiers which are transferred to the National Archives of the United States are exempt from most provisions of the Privacy Act of 1974 (5 U.S.C. 552a) except for publication of a notice in the *Federal Register*. NARA publishes a notice of the records newly

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 01-1117**

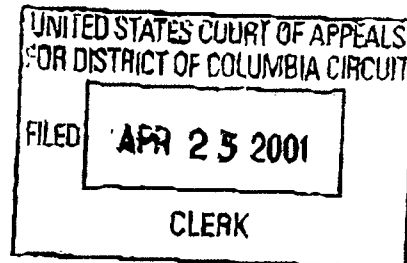
**September Term, 2000**

Alicia Carolyn Evelyn,  
Petitioner

v.

Librarian of Congress,  
Respondent

Filed On:



**ORDER**

Upon consideration of petitioner's motion to dismiss petition for review , it is

**ORDERED** that the motion be granted and this case is hereby dismissed.

The Clerk is directed to transmit forthwith to the respondent a certified copy of this order in lieu of formal mandate.

**FOR THE COURT:**

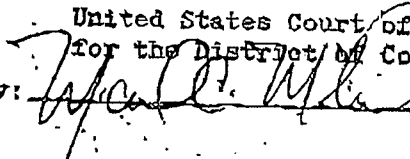
Mark J. Langer, Clerk

BY:

A handwritten signature in cursive script, appearing to read "Robert A. Bonner".

Robert A. Bonner  
Deputy Clerk

A True copy:

United States Court of Appeals  
for the District of Columbia Circuit  
By:  Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILE COPY

ALICIA CAROLYN EVELYN,  
PETITIONER

V.

THE LIBRARIAN OF CONGRESS,  
RESPONDENT

NO. 01-1117

PETITION FOR REVIEW OF THE ORDER FOR  
DISTRIBUTION OF 1995, 1996, 1997, AND  
1998 DIGITAL AUDIO RECORDING TECHNOLO-  
GY ROYALTIES

MOTION FOR VOLUNTARY DISMISSAL OF EVELYN'S PETITION FOR  
REVIEW OF THE ORDER FOR DISTRIBUTION OF 1995, 1996, 1997,  
AND 1998 DIGITAL AUDIO RECORDING TECHNOLOGY ROYALTIES

UNDERSIGNED CONTACTED COUNSEL FOR THE LIBRARIAN AND WAS  
ADVISED BY MARK W. PENNAK, ESQ., THAT THE GOVERNMENT HAS NO  
OPPOSITION TO HER MOTION TO DISMISS THE PETITION, WITH EACH  
PARTY TO BEAR ITS OWN COSTS, UNDER RULE 42. PETITIONER NOW  
FILES THIS MOTION REQUESTING DISMISSAL OF HER PETITION FOR  
REVIEW OF THE LIBRARIAN'S ORDER.

RESPECTFULLY SUBMITTED,



ALICIA CAROLYN EVELYN  
PETITIONER, PRO SE  
10 HIGHLAND AVENUE  
BINGHAMTON, NEW YORK 13905  
TEL.: (607) 797-2286

April 12, 2001

COPYRIGHT ARBITRATION ROYALTY PANEL

GENERAL COUNSEL  
OF COPYRIGHT

Jan 16 1996

RECEIVED

In the Matter of:

Distribution of DART Royalty Funds  
for 1992, 1993, and 1994

Docket No. 95-1 CARP DD 92-94

The Claimants

Broadcast Music, Inc., the American Society of Composers, Authors and Publishers, SESAC, Inc., the Harry Fox Agency, Inc. (a subsidiary of the National Music Publishers' Association, Inc.), Copyright Management, Inc., The Songwriters Guild of America, and the Gospel Music Coalition (collectively, the "Settling Parties").

Eugene "Lambchops" Curry

Alicia Carolyn Evelyn

Report of the Arbitration Panel

For the reasons set forth below, we find that the Musical Works Funds, Writers and Publishers Subfunds for 1992, 1993 and 1994, should be allocated as follows:

To Mr. Curry: 0.007096% of both the Writers and Publishers Subfunds in 1992; 0.001608% of both the Writers and Publishers Subfunds in 1993; and 0.003398% of both the Writers and Publishers Subfunds in 1994.

To Ms. Evelyn: 0.000084% of only the Writers Subfund in 1993; and 0.000082% of only the Writers Subfund in 1994.

To the Settling Parties: 99.992904% of both the Writers and Publishers Subfunds in 1992; 99.998308% of the Writers Subfund and 99.998392% of the Publishers Subfund in 1993;



and 99.99652% of the Writers Subfund and 99.996602% of the Publishers Subfund in 1994.

## **BACKGROUND**

### **The Audio Home Recording Act of 1992**

1. In enacting the Audio Home Recording Act of 1992, Pub. L. No. 102-563 (1992) (the "Act"), Congress responded to recent advances in digital audio recording technology that made the private home copying of music a serious concern of copyright owners. The effective date of the Act was October 28, 1992. 17 U.S.C. §1001 et seq.

2. The Act established the statutory framework for the Digital Audio Recording Technology ("DART") royalty funds. It contains a royalty payment system that provides "modest compensation to the various elements of the music industry for the digital home recordings of copyrighted music." S. REP. No. 294, 102d Cong., 2d Sess. 30 (1992). Importers and manufacturers bear the cost of copyright license fees that are collected by the Copyright Office ("Office") and deposited in the Treasury of the United States. 17 U.S.C. § 1005.

3. By statute, these fees are divided into two funds from which royalty allocations are to be made: the Sound Recordings Fund, to which two-thirds of all fees are apportioned; and the Musical Works Fund, to which one-third of all fees are apportioned. 17 U.S.C. § 1006(b). This proceeding addresses only the distribution of Musical Works Fund royalties. The Musical Works Fund is subdivided evenly into the Writers Subfund and the Publishers Subfund. 17 U.S.C. 1006(b)(2)(B). Under the Act, claims must be filed during January and February of the calendar year following the year for which claims are being made. 17 U.S.C. § 1007(a)(1).

4. The Act, as originally enacted, authorized the Copyright Royalty Tribunal ("CRT") to distribute the royalties. Pub. L. No. 102-563, Subchapter C. On December 17, 1993, Congress abolished the CRT and replaced it with ad hoc copyright arbitration panels administered by the Office. Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198 (1993).

5. This Panel was appointed to determine the distribution of Musical Works Fund royalties for 1992, 1993 and 1994. 17 U.S.C. §§ 801(b)(3), 802. As noted above, the effective date of the Act was October 28, 1992. Therefore, the royalty funds collected for 1992 represent license fee payments made only for the period October 28 through December 31, 1992. On the other hand, the 1993 and 1994 royalty funds represent payments made for each of those two full calendar years.

6. The Act sets forth the statutory criteria to be considered in a Musical Works Fund royalty distribution determination. 17 U.S.C. § 1006(c)(2). The only relevant criteria under the statute are "the extent to which, during the relevant period...each musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions." Id.

7. Initially, the CRT established rules and regulations governing DART distribution proceedings. 57 Fed. Reg. 54542 (1992). Thereafter, the Office established rules governing both DART distribution proceedings and administration of the ad hoc arbitration panels. 59 Fed. Reg. 63043; 59 Fed. Reg. 63025 (1994).

#### **The 1992, 1993 And 1994 Musical Works Fund Royalty Distribution Proceeding**

8. Thirty individual and joint claimants, including the Settling Parties, filed claims

to either or both Subfunds of the Musical Works Fund for 1992, 1993 and/or 1994. See generally claims filed in DART Musical Works Funds for 1992, 1993 and 1994. Among them were Eugene "Lambchops" Curry, who filed claims for both the Writers and Publishers Subfunds for each of these three years, and Alicia Carolyn Evelyn, who filed claims only for the Writers Subfund and only for 1993 and 1994. Id.

9. On November 3, 1993, the Settling Parties filed a motion with the CRT to consolidate the 1992 and 1993 DART distribution proceedings. In an Order dated November 29, 1993, the CRT granted the motion. Order, In the Matter of 1992 Audio Home Recording Act Distribution Proceeding, CRT Docket No. 93-1-92DRD (Nov. 29, 1993). On December 17, 1993, Congress abolished the CRT, replacing it with arbitration panels. On June 10, 1994, the Settling Parties and other claimants filed a motion with the Office to consolidate the 1992, 1993 and 1994 DART distribution proceedings. In an Order dated July 7, 1994, the Office granted that motion. 59 Fed. Reg. (1994).

10. On February 23, 1995, the Office published a notice requesting comments on the existence of controversies in the consolidated proceeding and notices of intent to participate. 60 Fed. Reg. 12251 (1995). Comments on controversies were filed by April 20, 1995, and notices of intent to participate were filed by May 5, 1995.

11. On July 10, 1995, the Settling Parties filed a motion to dismiss the claim of John Pillin, Jr., d/b/a Ultra Hot Razor Music,<sup>1</sup> for failure to follow the rules of the Office. On September 18, 1995, the Office granted this motion and dismissed Mr. Pillin's claim.

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<sup>1</sup> The motion originally sought to dismiss the claims of two additional claimants (ACEMLA and Performance Record and Tape Distributors). On September 8, 1995, after settling with those two claimants, the Settling Parties withdrew their motion against them, and these two claimants withdrew their respective claims.

12. By December 22, 1995, the Settling Parties had notified the Office that they had settled with or agreed to represent nearly all of the remaining claimants in this proceeding.<sup>2</sup> The only claimants not included in the Settling Parties' notification were James Gideon Cannings and Can Can Music, Bopp Du Wopp, Inc. (represented by David N. Cone), Ms. Evelyn, and Mr. Curry and the publishing company he represents, Tajai Music.

13. On December 22, 1995, the Settling Parties filed a motion for summary judgment, asserting that no genuine issues of material fact were in dispute. In that motion, the Settling Parties included evidence of both performances and record sales, if any, for each of the four remaining individual claimants. On February 21, 1996, the Office denied the motion, stating that the Library of Congress does not have summary judgment authority when a "valid controversy" exists. In that Order, the Office further set forth a date for the filing of written direct cases (March 25, 1996) and a precontroversy discovery schedule.

14. On March 25, 1996, pursuant to the Office's February 21st scheduling order, the Settling Parties, James Gideon Cannings, Mr. Curry and Ms. Evelyn timely filed written direct cases. Bopp Du Wopp, Inc. filed its case with the Office on March 27, 1996, two days late.

15. On April 2, 1996, the Settling Parties filed motions (1) to resolve their controversy with Ms. Evelyn and to enter an award on her behalf in the amount of the percentage she claimed in her direct case; (2) to dismiss Mr. Cannings for failure to state a claim or to present any evidence in his direct case; and (3) to dismiss Bopp Du Wopp, Inc. for failure to file timely a direct case or to present any evidence in the case it did file. On May

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<sup>2</sup> See Settling Parties' notices to the Office filed on September 8, 1995 and on December 22, 1995.

9, 1996, the Office dismissed the claims of Mr. Cannings<sup>3</sup> and Bopp Du Wopp, Inc. and denied the Settling Parties' motion as to Ms. Evelyn on the grounds that the Office's rules permit claimants to amend their claimed shares of royalties at any time up to the filing of proposed findings of fact and conclusions of law. Thereafter, the remaining parties exchanged discovery.

16. On June 14, 1996, the Settling Parties filed a motion to compel production of documents from Mr. Curry regarding the assertion in his direct case that he had written over three hundred songs. In an Order dated July 2, 1996, the Office granted the motion to compel. Mr. Curry failed to comply with the Office's Order.

17. On June 24, 1996, in view of the paucity of evidence in the written direct cases of Mr. Curry and Ms. Evelyn, the only remaining individual claimants in this proceeding, and the small amount of money in controversy, the Settling Parties filed a motion to dispense with formal hearings and to conduct this proceeding on the basis of written pleadings alone. On July 25, 1996, the Office denied the motion, but certified the issue for decision by the Arbitration Panel.

18. On July 8, 1996, by letter, the Office requested the parties to agree to a mechanism to pay the costs of this arbitration. The Settling Parties suggested that, because the cost of a fully-litigated proceeding could exceed the funds available for distribution, the parties should establish an escrow account through which all parties would bear the cost of the

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<sup>3</sup> Thereafter, on June 10, 1996, Mr. Cannings, pro se, filed a motion for a stay and a petition to review the Office's order in the United States Court of Appeals for the Second Circuit. On June 25, 1996, after oral argument, the Second Circuit denied the motion for a stay and dismissed the appeal. On August 8, 1996, Mr. Cannings filed in the Second Circuit a motion for an emergency stay. On August 9, 1996, that motion was denied without briefing. On October 23, 1996, Mr. Cannings filed another motion for an emergency stay, this one in the United States Court of Appeals for the District of Columbia Circuit. This motion, too, was denied on November 13, 1996.

proceeding on an on-going basis. In opposition, Mr. Curry and Ms. Evelyn suggested that the costs be deducted directly from the royalty funds. As a consequence, the parties were unable to agree upon a manner of payment. Thereafter, on September 17, 1996, the Office determined that a prehearing conference should be held by this Panel to address the issue of payment of costs of the proceeding and other pending matters. 61 Fed. Reg. 49799 (1996).

19. On October 4, 1996, the Panel met with Mr. Curry, Ms. Evelyn and representatives of the Settling Parties and, with the consent of all parties, ruled that arbitration costs should be deducted from the royalty funds. The agreement of the parties was facilitated by the Panel's determination that, for good cause shown, it was in the public interest to waive the requirement of an oral evidentiary hearing and to proceed on the written pleadings alone. Order, In the Matter of Distribution of DART Royalty Funds for 1992, 1993, and 1994, Docket No. 95-1 CARP DD 92-94, at 1-3 (Oct. 4, 1996); Prehearing Conference Before the Panel, October 4, 1996, Tr. at 28-32.

20. Accordingly, the Panel ordered the parties to file their respective proposed findings of fact and conclusions of law on or before November 4, 1996, and to file reply findings on or before November 14, 1996. The Panel limited the proposed findings of fact to material contained in the written direct cases filed in this proceeding. Tr. at 33-35.

### FINDINGS OF FACT

21. The Settling Parties proposed that the Musical Works Fund royalties at issue be distributed among themselves, Mr. Curry and Ms. Evelyn proportionately according to the extent the evidence establishes that musical works claimed by each party were distributed in the form of recordings in the United States during the relevant time period. See written direct case of Settling Parties ("direct case") at 11-12. In the interest of minimizing costs, and given the very small amount in controversy, the Settling Parties presented a direct case based on sales data alone. See affidavit of Alison Smith, Tab A of direct case, at ¶ 8 (hereinafter "Smith Aff."). The Settling Parties acknowledged that a Musical Works Fund distribution determination can be based on either performance data, sales data, or both and stated that their reliance on sales data in this proceeding was not intended to bind them, either singly or as a group, to presentation of particular evidence in any future DART distribution proceeding. Id. See also 17 U.S.C. § 1006(c)(2).

22. The Settling Parties' analysis was in three parts. First, they established the universe of record sales for 1992, 1993 and 1994. Second, they determined what portion of total record sales was attributable to song titles claimed by Mr. Curry and Ms. Evelyn in the years for which these two individuals filed claims in this proceeding. For this analysis, the Settling Parties did not dispute the titles claimed by Mr. Curry and Ms. Evelyn. And, finally, the Settling Parties claimed, on behalf of the hundreds of thousands of songwriters and music publishers they represent, credit for all other song titles owned by claimants in this proceeding and sold as records in the United States during 1992, 1993 and 1994.

**The Settling Parties Introduced Sales Data For All Works Distributed During The Relevant Time Period**

23. The Settling Parties introduced the testimony of Michael Fine, co-founder and Chief Executive Officer of SoundScan, to establish total record sales and record sales for Mr. Curry and Ms. Evelyn. See Tab B of the Settling Parties' direct case, the affidavit of Michael Fine (hereinafter referred to as "Fine aff. at ¶ "). SoundScan, which first became available in early 1991, is the premier independent online information system that tracks music sales throughout the United States. Fine Aff. at ¶¶ 1 & 3. SoundScan gathers point-of-sale data from over 14,000 reporting entities, including retail and mass merchandisers. Id. at ¶ 4. Each week, the data is sent by these reporting entities from point-of-sale cash registers by modem to SoundScan. Id. Data files consist of store ID number, piece counts and the Universal Product Codes. Id. Currently, all major record labels and most independent labels subscribe to SoundScan, and Billboard magazine music charts are constructed directly from SoundScan data. Id. at ¶ 3.

24. Mr. Fine introduced SoundScan data establishing that there were in excess of 1,735,015,000 albums<sup>4</sup> and 317,090,000 singles sold in the United States during 1992, 1993 and 1994. Fine Aff. at ¶ 7. Mr. Fine assumed that, on average, there are 10 song titles on each album, Id., and concluded, therefore, that there were in excess of 17 billion total sales of song titles in the United States during those three years. Mr. Fine's assumption regarding the average number of song titles on albums is uncontradicted by any evidence in the record of this proceeding. The details of Mr. Fine's analysis are set forth below:

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<sup>4</sup> The term "album" is used to refer to all long-playing music formats including compact discs (CDs), cassette albums, as well as the traditional vinyl album.



CHART A

Item	1992	1993	1994
1) Total Album Sales	547,964,000	572,380,000	614,671,000
2) Total Titles on Albums Sold	5,479,640,000	5,723,800,000	6,146,710,000
3) Total Single Sales	107,254,000	110,816,000	99,020,000
4) Total Sales of Titles on Albums and Singles (2 + 3)	5,586,894,000	5,834,616,000	6,245,730,000 <sup>5</sup>

Id.

**The Settling Parties' Data On Sales Information For Mr. Curry And Ms. Evelyn Demonstrate Only A Few Sales For Each During The Relevant Period**

25. The Settling Parties also introduced testimony from Alison Smith, Vice President, Performing Rights, of BMI. Ms. Smith has been an employee of BMI since 1985 and, for the past six years, her concentration within BMI has been in the area of royalty distributions for radio and television performances. In 1990, she was made Director, Performing Rights, and in August 1992, Senior Director. In this latter capacity, she is familiar with those aspects of BMI's operations designed to monitor performances of music on radio and television stations, as well as broadcast and cable television networks. Ms. Smith is generally familiar with the music industry. Smith Aff. at ¶¶ 1-3.

26. According to Ms. Smith, Mr. Curry and Ms. Evelyn identified for the Settling Parties the titles of songs that Mr. Curry and Ms. Evelyn claim, respectively, and for which they

<sup>5</sup> SoundScan rounds total sales figures to the nearest thousand.

believed sales occurred during the relevant period. Id. at ¶ 10. The Settling Parties used Phonolog, the industry standard directory of all records, CDs, cassettes, albums and singles that have been issued in the United States to determine all albums and singles on which these musical works may have appeared. Id. at ¶¶ 11-12.

27. Phonolog data showed that the following seven song titles claimed by Mr. Curry appear on five albums and one single:

CHART B

Album Title (s) = Single	Artist	Song Title
Burnin'	P. Labelle	Somebody Loves You Baby
Burnin'	P. Labelle	Burnin'
Burnin' (s)	P. Labelle	Burnin'
This Christmas	P. Labelle	Born in a Manger
This Christmas	P. Labelle	O Holy Night
Patti Labelle Live	P. Labelle	Somebody Loves You Baby
Gems	P. Labelle	If I Didn't Have You
Put Love to Work	Wooten Brothers	Hasty Decisions

Id. at ¶ 13.

28. Phonolog data showed that the following four song titles claimed by Ms. Evelyn appear on five albums:

### CHART C

Album Title	Artist	Song Title
Mr. Excitement	Jackie Wilson	I Get the Sweetest Feeling
Best of the Turbans	The Turbans	Let Me Show You Around My Heart
Best of the Crests	The Crests	Flower of Love
Best of the Crests	The Crests	Six Nights a Week
Sixteen Candles/Very Best of the Crests and the Duprees	The Crests and The Duprees	Six Nights a Week
Crests Greatest Hits	The Crests	Flower of Love
Crests Greatest Hits	The Crests	Six Nights a Week

Id. at ¶ 13.

29. According to Ms. Smith, Mr. Curry was a co-author with others on the songs identified in Chart B above, and Ms. Evelyn was co-author with others on the songs identified in Chart C above. Id. at ¶ 12. Therefore, the Settling Parties credited Mr. Curry and Ms. Evelyn with shares of their song titles proportionate to the extent of their respective co-authorship of each work. Id. at ¶¶ 13-14.

30. Ms. Smith testified that Mr. Curry is entitled to credit as a co-author for each of his seven songs as follows:<sup>6</sup>

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<sup>6</sup> Mr. Curry acknowledges that he is the co-author of these seven songs, but claims that he is entitled to 100% of any distribution and is currently "in Court to straighten out these percentages" (Curry Response to Settling Parties ¶2). Being an unsworn statement and not contained in Mr. Curry's direct case, no consideration can be given to this claim.

CHART D

Song Title	Co-author Share
Somebody Loves You Baby	50%
Burnin'	50%
Born in a Manger	25%
O Holy Night	10% <sup>7</sup>
If I Didn't Have You	50%

Id at 13.

31. Ms. Smith also testified that Ms. Evelyn is entitled to a 50% credit as a co-author for each of her four titles. Id.

32. The Settling Parties provided the Phonolog information to Mr. Fine and SoundScan along with the co-author percentages of Mr. Curry and Ms. Evelyn for each of their titles. Id. at ¶ 14.

33. By applying the SoundScan data, Mr. Fine determined the number of units (albums and singles) sold containing songs claimed by Mr. Curry and Ms. Evelyn. From that data, Mr. Fine was able to determine the number of individual song title sales attributable to titles claimed by Mr. Curry and Ms. Evelyn. Fine Aff. at ¶ 8.

34. Mr. Fine's testimony showed that there were 1,486,986 total song title sales in 1992, 1993 and 1994 attributable to titles claimed by Mr. Curry. Id. at ¶ 8 (Exhibit 3). Mr. Fine then applied the co-authorship information about Mr. Curry provided to him by Ms. Smith. Id. at ¶ 8, fn.1. According to Mr. Fine, taking into consideration co-authorship shares, Mr. Curry should be credited with song title sales of 394,467.05 in 1992, 93,816.7

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50% of 20% credit for arranging a public domain work.

in 1993, and 212,235.2 in 1994. Id. at ¶ 8. The details of Mr. Fine's analysis with respect to Mr. Curry are contained in the following chart:

CHART E

Album Title (s)=Single	Artist	Song Title	Co-author Share	Total Sales in Year (Sales Credited based on Co-author Share)		
				1992	1993	1994
Burnin'	P. Labelle	Somebody Loves You Baby	50%	302,084 (151,042)	37,334 (18,667)	17,298 (8,649)
Burnin'	P. Labelle	Burnin'	50%	302,084 (151,042)	37,334 (18,667)	17,298 (8,649)
Burnin' (s)	P. Labelle	Burnin'	50%	110,793 (55,396.5)	1,709 (854.5)	67 (33.5)
This Christmas	P. Labelle	Born in a Manger	25%	23,743 (5,935.75)	26,312 (6,578)	12,982 (3,245.5)
This Christmas	P. Labelle	O Holy Night	10%	23,743 (2,374.3)	26,312 (2631.2)	12,982 (1,298.2)
Patti Labelle Live	P. Labelle	Somebody Loves You Baby	50%	61,353 (30,676.5)	91,181 (45,590.5)	36,199 (18,099.5)
Gems	P. Labelle	If I Didn't Have You	50%	-	-	344,175 (172,087.5)
Put Love To Work	Wooten Brothers	Hasty Decisions	50%	-	1,657 (828.5)	346 (173)
Total Sales of Titles Identified by Mr. Curry				823,800	221,839	441,347
Sales Credited to Mr. Curry based on His Co-author Share				396,467.05	93,816.7	212,235.2

Id. at ¶ 8 (Exhibit 3).

35. Mr. Fine's testimony also showed that there were 20,059 total song title sales in 1993 and 1994 attributable to titles claimed by Ms. Evelyn. Id. at ¶ 8 (Exhibit 2). Mr.

Fine then applied the co-authorship information about Ms. Evelyn provided to him by Ms. Smith. Id. at ¶ 8, fn.1. According to Mr. Fine, taking into account co-authorship shares, Ms. Evelyn should be credited with song title sales of 4,917.5 in 1993 and 5,112 in 1994. Id. at ¶ 8. The details of Mr. Fine's analysis with respect to Ms. Evelyn are contained in the following chart:

CHART F

Album Title (s)=Single	Artist	Song Title	Co-author Share	Total Sales in Year (Sales Credited based on Co-author Share)		
				1992	1993	1994
Mr. Excitement	Jackie Wilson	I Get the Sweetest Feeling	50%	NA	5,217 (2,608.5)	2,140 (1,070)
Best of the Turbans	The Turbans	Let Me Show You Around My Heart	50%	NA	0	106 (53)
Best of the Crests	The Crests	Flower of Love	50%	NA	1,948 (974)	1,811 (905.5)
Best of the Crests	The Crests	Six Nights a Week	50%	NA	1,948 (974)	1,811 (905.5)
Sixteen Candles/Very Best of the Crests and the Duprees	The Crests and The Duprees	Six Nights a Week	50%	NA	0	3,346 (1,673)
Crests Greatest Hits	The Crests	Flower of Love	50%	NA	361 (180.5)	505 (252.5)
Crests Greatest Hits	The Crests	Six Nights A Week	50%	NA	361 (180.5)	505 (252.5)
Total Sales of Titles Identified by Ms Evelyn				NA	9,835	10,224
Sales Credited to Ms. Evelyn based on Her Co-author Share				NA	4,917.5	5,112

Id. at ¶ 8 (Exhibit 2).

**The Settling Parties Represent All Claims Except Those Of Mr. Curry And Ms. Evelyn**

36. The Settling Parties consist of BMI, ASCAP, SESAC, HFA, CMI, SGA and GMC. See claims of BMI, ASCAP, SESAC, HFA, CMI, SGA and GMC and accompanying lists of the individual songwriter and music publisher claimants represented in this proceeding by each of these joint claimants.<sup>8</sup> In the aggregate, the Settling Parties represent hundreds of thousands of domestic songwriters and music publishers, as well as the songwriters and music publishers of foreign performing rights and mechanical rights organizations that have authorized the Settling Parties to act on their behalf in this proceeding. See Claims of the Settling Parties; see also Smith at ¶¶ 4 & 15.<sup>9</sup>

37. Based on her long experience in the music performing rights field and extensive knowledge of the music catalogs represented by the Settling Parties, Ms. Smith stated that the Settling Parties represent the writers and publishers of virtually all song titles contained on records sold during the time period relevant to this proceeding other than sales of titles that may be attributable to Mr. Curry or Ms. Evelyn. Smith Aff. at ¶ 15.<sup>10</sup>

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<sup>8</sup> The Settling Parties also represent the interests of nineteen other claimants who filed claims in either or both of the Musical Works Subfunds and who have either settled with or agreed to be represented in this proceeding by one or another of the Settling Parties.

<sup>9</sup> The Copyright Office has determined that the performing rights organizations (BMI, ASCAP and SESAC) represent all of their respective members and affiliates in this proceeding other than those who have designated some other party to represent them or have filed claims on their own behalf. 58 Fed. Reg. 6441 (1993); 59 Fed. Reg. 63043 (1994).

<sup>10</sup> Any songwriter or music publisher who has not settled with or agreed to be represented by the Settling Parties and who has not appeared as a claimant in his or her own right is not eligible for an award of any royalties in this proceeding.



**Mr. Curry Presented Evidence Of Record Sales, But No Evidence Of Performances Of His Works During 1992, 1993 or 1994**

38. In his direct case, Mr. Curry submitted two documents that contain sales information provided to him by record companies. The first is an undated earnings statement from Sony Music. The statement shows sales information for five titles: "Born in a Manger," "Burnin' (The Fire Is Still)," "If I Didn't Have You," "O Holy Night," and "Somebody Loves You Baby." The statement reflects total sales of 40,939 units, but contains no information as to when these sales occurred.

39. The second document is a royalty statement from Gamble-Huff Music. This statement shows sales for four titles: "Burnin' (The Fire is Still Burnin') For You," "Somebody Loves You Baby (You Know Who It Is)," "If Everyday Could Be Like Christmas," and "Born in a Manger." The statement reflects total sales of 174,422 units for the period September 30, 1992 through March 31, 1994 as follows:

CHART G

Song Title	Units Sold		
	1992	1993	1994
Burnin' (The Fire is Still Burnin') For You	71,497	57,325	23,789
Somebody Loves You Baby (You Know Who It Is	0	15,805	5,108
Born In A Manger	0	449	0
If Everyday Could Be Like Christmas	0	449	0
Total	71,497	74,028	28,897

Id. at ¶ 8 (Exhibit 2)

40. While relying on record company sales data to establish the number of units sold containing songs he claims, Mr. Curry provided no information regarding the universe of record company sales data for 1992, 1993 and 1994 against which sales of his songs can be measured. Moreover, Mr. Curry proposed no systematic method or formula for determining his or any other claimants' award in this proceeding.

**Ms. Evelyn Presented No Credible Evidence Of Sales Or Performances Of Her Works During 1993 or 1994.**

41. In her proposed findings, Ms. Evelyn continues her effort to use this proceeding to express her apparent discontent with certain members of the Settling Parties when they represented her. See Evelyn Proposed Findings at ¶¶ 4-25. Such disputes are not properly before this body. In her direct case, Ms. Evelyn submitted no credible evidence of sales or performances in the U.S. during the time period relevant to this proceeding. See generally direct case of Alicia Carolyn Evelyn.

42. Ms. Evelyn's exhibit A1 includes title registration information from ASCAP for three titles: "Dance," "I'm Counting on You" and "Easy Come Easy Go." This exhibit contains no sales or performance data. Evelyn Ex. A1.

43. Ms. Evelyn's exhibits A2a and A2b are photocopies of copyright registration cards from the Library of Congress. These exhibits contain no sales or performance data. Evelyn Ex. A2a & A2b.

44. Ms. Evelyn's exhibit A2 is a blank ASCAP title registration form. It contains no sales or performance data. Evelyn Ex. A2.

45. Ms. Evelyn's exhibit B contains several unrelated documents. The first is a portion of Ms. Evelyn's BMI catalog. This contains no sales or performance data. Evelyn Ex.

B. The second document is a letter from ASCAP, dated January 29, 1993, indicating that four song titles by Ms. Evelyn had performances at some point prior to the date of the letter. Id. Nothing in that letter, however, indicates that any performances took place during the 29 days in which the letter overlapped the dates of Ms. Evelyn's claim (the period between January 1, 1993, and January 29, 1993). The third document contains information on "I've Found a Better Way," "I Can't Stop Loving You," "You Gotta Move," "Fresh Pain," "Bashful Bumbler" and "Click (The Camera Song)." Id. Again, no information on sales or performances is set forth. The fourth document, a title registration information form for "When We Have Our Kids," provides no sales or performance data. Id. The fifth document, a title registration information form for "My Girl Ivy," also contains no sales or performance data. Id. The sixth document, a copy of Ms. Evelyn's application for membership in ASCAP, contains no sales or performance data. The final document is a second letter from ASCAP updating Ms. Evelyn on a review of her titles. It, too, contains no sales or performance data. Id.

46. Ms. Evelyn's exhibit C, a portion of her BMI catalog printed in June of 1995, contains information on four titles: "I'm Counting On You," "I'm Here To Tell You," "I'm Not Built Like That" and "I'm Sorry for the Guy." Only one title, "I'm Counting On You," is listed as "active, performed, domestic." But this attribution information does not indicate when any performances of the work took place or how many performances, if any, occurred.

47. Ms. Evelyn claims that a song she wrote was included in a movie that "was shown on cable TV in Brooklyn." Evelyn Direct Case at 3. Ms. Evelyn has offered no evidence to establish that this performance occurred during either 1993 or 1994, the years in which she filed

claims in this proceeding.<sup>11</sup>

48. Ms. Evelyn proposed no systematic method or formula for determining her or any other claimants' award in this proceeding.

### CONCLUSIONS

#### **The Statutory Criteria For Distribution Of DART Musical Works Fund Royalties Are Sales Or Performances During The Relevant Period**

49. In making this distribution determination, the Arbitration Panel has been guided by the relevant provisions of the copyright law (particularly the Audio Home Recording Act of 1992), as well as by previous procedural decisions of the Copyright Office and its rules and regulations. See 17 U.S.C. §§ 801(b)(3) and (c); 802(c); and 37 C.F.R. 251.7.

50. In clear and unambiguous language, the Act specifies the statutory criteria to be considered in a Musical Works Fund royalty distribution determination. 17 U.S.C. § 1001 et seq. The only relevant criteria to the allocation of royalty payments under the Act are those that establish "the extent to which, during the relevant period . . . each musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions." 17 U.S.C. § 1006(c)(2).

51. The controversy in this proceeding involves the relative entitlement of the Settling Parties, on the one hand, and Mr. Curry and Ms. Evelyn, on the other, to the award of shares of Musical Works Fund royalties paid to the Office for the period October 28, 1992, through December 31, 1994. After deduction of the costs of this arbitration and reasonable

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<sup>11</sup> In fact, although not before this body, it appears that a document provided by Ms. Evelyn during the discovery phase of this proceeding, showed the performance as having taken place in 1995, clearly outside of the time period here involved.

administrative costs incurred by the Office, all of the remaining funds must be distributed. See 17 U.S.C. § 1007(c).

52. In a distribution proceeding under the Act, each party may receive an award either in accordance with a voluntary agreement among all parties or to the extent they establish their entitlement by the presentation of competent and relevant evidence. In this proceeding, the parties may establish their entitlement only through evidence showing the extent to which their musical works have been distributed in recordings or disseminated in transmissions during the relevant period. Evidence of disputes concerning other matters are irrelevant to this or any Musical Works Fund distribution determination.

53. The Settling Parties proposed a mathematical formula for determining Mr. Curry and Ms. Evelyn's respective shares in this proceeding. That formula is as follows:

$$\frac{\text{Total song title sales credited to claimant in year X}}{\text{Total song titles sold during year X}} = \frac{\text{Proportionate Share of Total Royalties}}{\text{Total Royalties}}$$

54. Applying this formula, Mr. Curry and Ms. Evelyn each receives credit for record sales in proportion to their respective "writer's share" on each title sold. The formula mirrors the statutory criteria for distribution of Musical Works Fund royalties by allocating royalties to each musical work based on its proportionate share of total record sales during each year. In the Panel's view, crediting Mr. Curry and Ms. Evelyn with a share of the sale of each work based on their proportionate co-authorship of that work both furthers the statutory goal of allocating royalties based on sales (and/or performances) and is simply a mathematical necessity. If each co-author of a song were to receive full credit for the sales attributable to that song, there

would be more credit for sales than actual sales. Thus, to give Mr. Curry and Ms. Evelyn, each of whom co-authored their respective song titles, full credit for all sales of each claimed title would either deny any credit to their co-authors or require that more than one hundred percent of the fund be distributed. There is no evidence in the record to suggest that any of Mr. Curry's or Ms. Evelyn's cowriters are not represented by the Settling Parties.

#### **The Settling Parties Have Established The Universe Of Record Sales To The Public**

55. The only evidence submitted in this proceeding by which a distribution determination may be made is the evidence submitted by the Settling Parties of the extent to which musical works have been distributed in the form of recordings during the relevant period. This is not to say that evidence of performances (that is, works disseminated to the public in transmissions) is irrelevant. To the contrary, pursuant to statute, evidence of performances during the relevant period stands on the same footing as sales evidence. 17 U.S.C. § 1006(c) (2). However, in the context of this particular proceeding, due to cost considerations, no performance data was submitted by the Settling Parties. The Panel notes that the Settling Parties reserved the right, in a future proceeding, to introduce evidence of performances.

56. The Settling Parties presented testimony based on an analysis of SoundScan data that established the universe of record sales. Specifically, the SoundScan data established that there were in excess of 2,052,105,000 total album and single unit sales during the relevant period. Assuming 10 songs on each album, the total number of song titles sold each year was as follows:

1992 -	5,586,844,000
1993 -	5,834,616,000
1994 -	6,245,730,000

**The Evidence Established That Mr. Curry And Tajai Music Are Entitled To No More Than 0.0070963% Of Both The Writers And Publishers Subfunds For 1992, 0.001608% Of Both The Writers And Publishers Subfunds For 1993, and 0.003398% Of Both The Writers And Publishers Subfunds For 1994.**

57. In his direct case, Mr. Curry submitted two documents that contain record sales information provided to him by record companies. The first is an undated earning statement from Sony Music that shows the sale of 40,939 units. That statement, however, contains no information as to when the sales occurred. Therefore, that statement cannot form the basis of any award to Mr. Curry in this proceeding.

58. The second statement is from Gamble-Huff Music.<sup>12</sup> It shows the sale of 174,422 units during the period September 20, 1992 through March 31, 1994. This statement by itself cannot form the basis of any award to Mr. Curry in this proceeding because it fails to identify the universe of sales against which this Panel may evaluate the number of sales attributable to songs he claimed.

59. The Settling Parties, through their direct case, identified seven song titles written by Mr. Curry that appear on five albums and one single sold in the United States during 1992, 1993 and 1994. Based on the percentage attributable to Mr. Curry's writer share for each of these songs, Mr. Curry's total song title sales in 1992 were 396,467.05, in 1993, they were 93,816.7, and in 1994 they were 212,235.2.

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<sup>12</sup> On its face, the Gamble-Huff document is flawed in ways that raise questions about the weight, if any, that it should be accorded. The document has clearly been redacted as can be seen by a partial date in the upper-right hand corner. The document also is incomplete, as demonstrated by the discrepancy between the total sales claimed on the document (1,038,330) and the total sales actually listed on the document (174,422). Moreover, the document covers a time period (in 1991) completely outside the scope of this proceeding. Finally, the document does not indicate whether the sales were domestic or international.

60. Using the total song title sales figures from SoundScan for each year, Mr. Curry's award in each year is determined for each Subfund using the following formula:

$$\frac{\text{Mr. Curry's sales in Year X}}{\text{SoundScan Total Sales for Year X}} = \frac{\text{Mr. Curry's Percentage of Fund in Year X}}{\text{of Fund in Year X}}$$

61. Applying this formula to the evidence in the record of Mr. Curry's total sales, Mr. Curry's entitlement to a percentage award for each Subfund in each year is limited to the following:

Claimant	1992		1993		1994	
	Writer	Pub.	Writer	Pub.	Writer	Pub.
Eugene "Lambchops" Curry (Tajai Music)	0.007096%	0.007096%	0.001608%	0.001608%	0.003398%	0.003398%

62. If Mr. Curry's own evidence of his song title sales (174,422 units) were used, and if those sales were measured against the universe of sales identified by SoundScan, Mr. Curry's award actually would be much lower. Using his own sales figures, Mr. Curry's award for each Subfund in each year would be no more than:

1992		1993		1994	
Writer	Pub.	Writer	Pub.	Writer	Pub.
0.001280%	0.001280%	0.001269%	0.001269%	0.000463%	0.000463%

63. Mr. Curry averred in his direct case that he had written over 300 songs. However, when asked by the Settling Parties to produce sales information for these songs, and ordered to provide such information by the Office, Mr. Curry failed to do so. Therefore, the



ordered to provide such information by the Office, Mr. Curry failed to do so. Therefore, the references to these 300 songs in Mr. Curry's direct case have been given no weight and cannot provide any basis for an award in this proceeding.

**The Evidence Established that Ms. Evelyn Is Entitled To No More Than 0.000084% From The 1993 Writers Subfund And 0.000082% From The 1994 Writers Subfund**

64. In her direct case, Ms. Evelyn introduced no evidence of sales of her musical works. Ms. Evelyn did introduce a single document that indicated that some performances of her musical works had occurred, but that document did not indicate either a date for these performances or the number of performances that occurred. Without this additional information, the document provides no basis for an award to Ms. Evelyn in this proceeding.

65. Because Ms. Evelyn has not submitted any evidence of sales or relevant evidence of performances of works she claims, she has not met her burden of proving entitlement and should receive no award in this proceeding. However, the Settling Parties introduced evidence of sales of Ms. Evelyn's musical works during the relevant years and on which an award may be based.

66. The Settling Parties, through their direct case, identified four song titles written by Ms. Evelyn that appear on five albums sold in the United States during 1993 or 1994 -- the only years for which Ms. Evelyn filed claims in this proceeding. Based on the percentage attributed to Ms. Evelyn's writer share, Ms. Evelyn's total song title sales in 1993 were 4,917.5, and in 1994 they were 5,112.

67. Using the total song title sales figures from SoundScan for each year, Ms. Evelyn's award in each year is determined for each Subfund using the following formula:

$$\frac{\text{Ms. Evelyn's sales in Year X}}{\text{SoundScan Total Sales in Year X}} = \frac{\text{Ms. Evelyn's}}{\text{in Year X}} \text{ Percentage of Fund}$$

68. Applying this formula to the evidence in the record, Ms. Evelyn's entitlement to a percentage award for each Subfund in each year is limited to the following:

Claimant	1992		1993		1994	
	Writer	Pub.	Writer	Pub.	Writer	Pub.
Alicia Carolyn Evelyn	NA	NA	0.000084 %	NA	0.000082 %	NA

**Except For The Limited Entitlement Established In The Record For Mr. Curry and Ms. Evelyn, The Settling Parties Are Entitled To The Remainder Of The Funds In Question**

69. The Settling Parties have established the universe of record sales for 1992, 1993 and 1994. They also determined what portion of total record sales are attributable to song titles claimed by Mr. Curry and Ms. Evelyn in the years for which these individuals filed claims in this proceeding. Moreover, the Settling Parties have demonstrated that they represent virtually all songwriters and music publishers and that they represent all claims in this proceeding other than those of Mr. Curry and Ms. Evelyn. Therefore, the Settling Parties, on behalf of the hundreds of thousands of songwriters and music publishers that they represent, are entitled to all royalties other than those apportioned to Mr. Curry and Ms. Evelyn.

### ALLOCATION

70. Based on the credible record evidence, the Panel concludes that the Musical Works Funds, Writers and Publishers Subfunds for 1992, 1993 and 1994, should be allocated as follows:

71. To Mr. Curry: 0.007096% of both the Writers and Publishers Subfunds in 1992; 0.001608% of both the Writers and Publishers Subfunds in 1993; and 0.003398% of both the Writers and Publishers Subfunds in 1994.

72. To Ms. Evelyn: 0.000084% of only the Writers Subfund in 1993; and 0.000082% of only the Writers Subfund in 1994.

73. To the Settling Parties: 99.992904% of both the Writers and Publishers Subfunds in 1992; 99.998308% of the Writers Subfund and 99.998392% of the Publishers Subfund in 1993; and 99.99652% of the Writers Subfund and 99.996602% of the Publishers Subfund in 1994.

Respectfully submitted,

Arbitration Panel

Lenore G. Ehrig  
Lenore G. Ehrig  
Chairperson

Lewis Hall Griffith  
Lewis Hall Griffith  
Arbitrator

Sharon T. Nelson  
Sharon T. Nelson  
Arbitrator

Dated: 12-16-96

Dated: February 7, 1997.

Cecily A. Rayburn,

Director, Division of Financial Management,  
Office of Management, Administration and  
Planning, Employment Standards  
Administration.

[FR Doc. 97-3476 Filed 2-11-97; 8:45 am]

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## LIBRARY OF CONGRESS

### Copyright Office

[Docket No. 95-1 CARP DD 92-94]

### Distribution of the 1992, 1993, and 1994 Musical Works Funds

AGENCY: Copyright Office, Library of  
Congress.

ACTION: Distribution order.

**SUMMARY:** The Librarian of Congress, upon recommendation of the Register of Copyrights, is announcing the distribution of the royalty fees collected for Digital Audio Recording Devices and Media (DART) in the 1992, 1993, and the 1994 Musical Works Funds. The Librarian is adopting in part and rejecting in part the decision of the Copyright Arbitration Royalty Panel (CARP).

**EFFECTIVE DATE:** The distribution percentages announced in this Order are effective on February 12, 1997.

**ADDRESSES:** The full text of the CARP's report to the Librarian of Congress is available for inspection and copying during normal business hours in the Office of the General Counsel, James Madison Memorial Building, Room LM-407, First and Independence Avenue, S.E., Washington, DC. 20540.

**FOR FURTHER INFORMATION CONTACT:** William Roberts, Senior Attorney, or Tanya M. Sandro, Attorney-Advisor, P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707-8380.

#### SUPPLEMENTARY INFORMATION:

I. Recommendation of the Register of Copyrights

#### Background

On October 28, 1992, Congress enacted the Audio Home Recording Act, Pub. Law No. 102-563 (1992). This Act requires manufacturers and importers to pay royalties on digital audio recording devices and media (DART) that are distributed in the United States. The royalties are collected by the Copyright Office and deposited with the Treasury of the United States. 17 U.S.C. 1005. These funds are distributed by the Copyright Office to interested copyright

parties who filed claims with the Copyright Office each year during January and February pursuant to either a universal settlement negotiated by the claimants to a particular subfund, or by Order of the Librarian of Congress (Librarian) following a distribution proceeding conducted by a Copyright Arbitration Royalty Panel (CARP).

The Act provides that the royalties are to be divided into two funds: the Sound Recordings Fund, which accounts for 66⅔% of the royalties, and the Musical Works Fund, which accounts for the remaining 33⅓% of the royalties. The Act further divides each fund into subfunds.

The Sound Recordings Fund consists of four subfunds, two of which, the Nonfeatured Musicians Subfund and the Nonfeatured Vocalists Subfund, account for 2⅝% and 1⅜%, respectively, of the Sound Recordings Fund and are administered by an independent administrator. The remaining 96% of the Sound Recordings Fund is further distributed between two additional subfunds, the Featured Recording Artist Subfund and the Sound Recording Owners Subfund, which receive 40% and 60%, respectively, of the remaining 96% share of the fund. The Musical Works Fund consists of two subfunds, the Publishers Subfund and the Writers Subfund, each of which receives 50% of that Fund. 17 U.S.C. 1006(b).

Thus, the Act establishes the percentages for each fund and subfund, but directs the CARPs, when necessary, to determine what amount each claimant within a subfund is entitled to receive. The determination and a full explanation underlying the conclusions are set out in a written report to the Librarian.

#### Distribution of Royalties

Royalties are collected on a quarterly basis from any importer or manufacturer that distributes any digital audio recording device or digital audio recording medium that it manufactured in or imported into the United States. 17 U.S.C. 1003(c). As discussed above, these royalties are collected by the Copyright Office and invested in interest-bearing securities with the United States Treasury for subsequent distribution to interested copyright parties. 17 U.S.C. 1005.

An interested copyright party must submit each year a written claim to the Copyright Office during the months of January and February. 17 U.S.C. 1007(a). Within 30 days after the last day for filing claims, the statute instructs the Librarian to ascertain whether there are any controversies among the claimants as to the proper distribution of the

royalties in their fund/subfund. If there are no controversies, the Librarian authorizes the distribution of the funds according to the terms of the negotiated agreements; otherwise, the Librarian is directed to convene a CARP or CARPs to decide the proper distribution of the royalties in each unresolved fund/subfund. 17 U.S.C. 1007(b)(c).

#### This Proceeding

The parties in this proceeding are Broadcast Music, Inc., the American Society of Composers, Authors, and Publishers, SESAC, Inc., the Harry Fox Agency, Inc. (a subsidiary of the National Music Publishers' Association, Inc.), Copyright Management Inc., The Songwriters Guild of America, and the Gospel Music Coalition (collectively, the "Settling Parties"), and two pro se claimants, Eugene Curry and Alicia Carolyn Evelyn. Ms. Evelyn and Mr. Curry, both songwriters, chose to represent their own interests in the proceeding. Mr. Curry also represented the publishing interest of Tajai Music, Inc. (Tajai) for the three years in dispute. The Settling Parties represent the over 264,000 remaining publishers and songwriters with a claim to a share of the royalties. Settling Parties Direct Case at 2-3.

The CARP in this proceeding was convened to determine the distribution of the royalties in the 1992, 1993, and 1994 Musical Works Funds, which totaled approximately \$355,500.00.<sup>1</sup> The Copyright Office received forty-one claims to the 1992 Musical Works Fund—twenty-one claims to the Writers Subfund and twenty claims to the Publishers Subfund. During the next filing cycle, the Office received twenty-two claims to the 1993 Musical Works Fund—twelve claims to the Writers Subfund and ten claims to the Publishers Subfund. In 1995, the Office received twenty-six claims to the 1994 Musical Works Fund, equally divided between the two subfunds.

This proceeding for the determination of the distribution of the DART royalties commenced on November 3, 1993, when the Settling Parties filed a motion with the Copyright Royalty Tribunal (Tribunal)<sup>2</sup> to consolidate the 1992 and

<sup>1</sup> Claimants to the royalties in the Sound Recordings Fund for 1992, 1993, and 1994 negotiated a settlement amongst themselves. The Library has made a full distribution of these funds to the interested copyright parties who filed timely claims for a share of these royalties. See Order, Docket No. 94-2 CARP-DD (December 15, 1994) and Order In Docket No. 95-1 CARP DD 92-94 (May 16, 1995).

<sup>2</sup> When the Audio Home Recording Act was passed, the Copyright Royalty Tribunal had the authority to conduct the DART distribution proceedings. The Tribunal, however, was abolished

1993 DART distribution proceedings. The CRT granted this motion on November 29, 1993, see Order, In the Matter of 1992 Audio Home Recording Act Distribution Proceeding, CRT Docket No. 93-1-92DRD (Nov. 29, 1993), but further proceedings were suspended upon the abolition of the CRT.

The Copyright Office instituted a new proceeding for the distribution of 1992 and 1993 DART royalties on March 1, 1994. 59 FR 9773 (March 1, 1994). In response to this notice, the Settling Parties and other claimants filed a motion with the Office requesting the Office to consolidate the 1992, 1993, and 1994 DART distribution proceedings. The Office granted this request and announced that it would set a schedule for a DART distribution proceeding in 1995. 59 FR 35762 (July 13, 1994).

On February 23, 1995, the Office published a notice requesting comments as to the existence of controversies in the consolidated proceeding, and notices of intent to participate. 60 FR 12251 (March 6, 1995). Twelve parties filed notices of intent to participate in this proceeding, including the Settling Parties, Ms. Evelyn, Mr. Curry and the publishing company he represents, Tajai.

Through a series of motions to dismiss certain parties and as a result of continued negotiations, nine parties remained in the DART distribution proceeding when the Librarian initiated a CARP to determine the distribution of the Musical Works Fund royalties for 1992, 1993, and 1994. 61 FR 40464 (August 2, 1996).

On October 4, 1996, the Parties met with the Panel which determined, for good cause shown, to proceed on the basis of the written pleadings alone.<sup>3</sup> CARP Order, Docket No. 95-1 CARP DD 92-94 (October 4, 1996). Accordingly, the CARP instructed the parties to file their respective proposed findings of fact and conclusions of law by November 4, 1996, and to file reply findings on or before November 14, 1996. The Panel limited the proposed findings of fact to the material contained

by Congress in 1993, and the authority to distribute DART funds was given to the CARPS, as administered by the Librarian of Congress. See the Copyright Royalty Tribunal Reform Act of 1993, Public Law No. 103-198.

<sup>3</sup> On June 14, 1996, the Settling Parties filed a motion to dispense with formal hearings and to conduct this proceeding on the basis of the written pleadings. The Librarian denied the motion, but designated the issue to the CARP for further consideration under their authority to suspend or waive the relevant provision of the regulations. Order, Docket No. 95-1 CARP DD 92-94 (July 25, 1996).

in the written direct cases previously filed on March 25, 1996. Transcript of October 4, 1996 Meeting at 33-35.

On December 16, 1996, the chairperson of the CARP delivered the Panel's written report to the Librarian.

#### The CARP Report

The Panel, after reviewing the written record, determined that the royalties in the 1992, 1993, and 1994 Musical Works Funds should be allocated as follows:

To Mr. Curry: 0.007096% of both the Writers and Publishers Subfunds in 1992; 0.001608% of both the Writers and Publishers Subfunds in 1993; and 0.003398% of both the Writers and Publishers Subfunds in 1994.

To Ms. Evelyn: 0.000084% of only the Writers Subfund in 1993; and 0.000082% of only the Writers Subfund in 1994.

To the Settling Parties: 99.992904% of both the Writers and Publishers Subfunds in 1992; 99.998308% of the Writers Subfund and 99.998392% of the Publishers Subfund in 1993; and 99.99652% of the Writers Subfund and 99.996602% of the Publishers Subfund in 1994. CARP Report, paras. 71-73.

The Panel utilized the only formula presented for calculating a claimant's share of the royalties. CARP Report, para. 53. The formula determines each claimants' proportionate share of the royalties as a percentage of the total song titles sold during a particular year based on evidence of a claimants' total song title sales for that year. *Id.*

#### Standard of Review

The Copyright Royalty Tribunal Reform Act of 1993 created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable, but the Reform Act created two layers of review: The Librarian of Congress, and the Court of Appeals for the District of Columbia Circuit. Section 802(f) of the Copyright Act directs the Librarian to either accept the decision of the CARP or reject it. If the Librarian rejects it, he must substitute his own determination "after full examination of the record created in the arbitration proceeding." *Id.* If the Librarian accepts it, then the determination of the CARP has become the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that is subject to review by the Court of Appeals.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the provisions of this title." Neither the Reform Act nor its

legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is any different from the "arbitrary" standard described in the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

Review of the case law applying the APA "arbitrary" standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency is generally considered to be arbitrary when it:

- (1) Relies on factors that Congress did not intend it to consider;
- (2) fails to consider entirely an important aspect of the problem that it was solving;
- (3) Offers an explanation for its decision that runs counter to the evidence presented before it;
- (4) Issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;
- (5) Fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; or
- (6) When the agency's action entails the unexplained discrimination or disparate treatment of similarly situated parties.

*Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983); *Celcom Communications Corp. v. FCC*, 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp. v. FAA*, 758 F.2d 685 (D.C. Cir. 1985).

Given these guidelines for determining when a decision is "arbitrary," prior decisions of the Court of Appeals for the District of Columbia Circuit reviewing the determinations of the former Copyright Royalty Tribunal (Tribunal) have been consulted. The decisions of the Tribunal were reviewed under the "arbitrary and capricious" standard of 5 U.S.C. 706(2)(A) which, as noted above, appears to be applicable to the Librarian's review of the CARP's decision.

Review of judicial decisions regarding Tribunal actions reveals a consistent theme: while the Tribunal was granted a relatively wide "zone of reasonableness," it was required to articulate clearly the rationale for its decision. See *National Association of Broadcasters v. CRT*, 772 F.2d 922 (D.C. Cir. 1985); *Christian Broadcasting Network v. CRT*, 720 F.2d 1295 (D.C. Cir. 1983); *National Cable Television Association v. CRT*, 689 F.2d 1077 (D.C. Cir. 1982); *Recording Industry Association of America v. CRT*, 662 F.2d 1 (D.C. Cir. 1981). As one panel of the D.C. Circuit succinctly noted:

We wish to emphasize \* \* \* that precisely because of the technical and discretionary nature of the Tribunal's work, we must

especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully \* \* \*.

*Christian Broadcasting Network, Inc. v. CRT*, 720 F.2d 1295, 1319 (D.C. Cir. 1983), quoting *National Cable Television Association v. CRT*, 689 F.2d 1077, 1091 (D.C. Cir. 1982).

Because the Librarian is reviewing the CARP decision under the same "arbitrary" standard used by the courts to review the Tribunal's decisions, he must be presented by the CARP with a detailed rational analysis of its decision, setting forth specific findings of fact and conclusions of law. This requirement of every CARP report is confirmed by the legislative history to the Reform Act which notes that a "clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress." H.R. Rep. No. 286, 103d Cong., 1st Sess. 13 (1993). Thus, to engage in reasoned decisionmaking, the CARP must "weigh all the relevant considerations and \* \* \* set out its conclusions in a form that permits [a determination of] whether it has exercised its responsibilities lawfully." *National Cable Television Association v. CRT*, 689 F.2d 1077, 1091 (D.C. Cir. 1982). This goal cannot be reached by "attempt[ing] to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record." *Christian Broadcasting Network, Inc. v. CRT*, 720 F.2d 1295, 1319 (D.C. Cir. 1983).

It is the task of the Register of Copyrights to review the CARP report and make her recommendation to the Librarian as to whether the report is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination.

#### *Petitions To Set Aside the Panel's Determination*

On January 2, 1997, and on January 3, 1997, the two pro se parties filed their petitions with the Librarian to modify and/or set aside the decision of the CARP, along with motions requesting leave to file the petitions late. See 37 C.F.R. 251.55(a). The Office accepted the late filings and issued an order requesting that any replies to the petitions be filed with the Office no later than January 17, 1997. Order, Docket No. 95-1 CARP DD 92-94 (January 3, 1997). The purpose of the petitions to modify or set aside the Panel's determination is to identify aspects of the Panel's report which are arbitrary with respect to record evidence

or contrary to the applicable statutory provisions.

In her petition, Ms. Alicia Evelyn enumerated an array of reasons to set aside the determination of the CARP in this proceeding, stating that "[t]he panel, in its report, failed to address matters in controversy \* \* \*." Petition to Set Aside the Determination of the Copyright Arbitration Royalty Panel in the Above-Referenced Matter Submitted by Alicia Carolyn Evelyn, Individual, Pro Se, Claimant (Evelyn Petition) at 2. The purported controversies which the CARP failed to address include: (1) Failure on the part of the Settling Parties to identify their DART eligible associates and members and at least one DART eligible title for the 1992-94 period, *Id.* at 2; (2) failure on the part of the Settling Parties to provide data to individual claimants pertaining to their DART eligible songs, including, but not limited to the songs "I'm Counting on You" and "I Thank You," *Id.* at 3; (3) selection of SoundScan to determine the extent of record sales rather than use of performance data, *Id.* at 7; (4) use by Mr. Michael Fine<sup>4</sup>, expert witness for the Settling Parties, of an incomplete list of DART eligible songs when evaluating SoundScan data for record sales of Ms. Evelyn, *Id.* at 7; (5) unexplained use of total record sales, as reported by SoundScan, for 1992, rather than record sales for the relevant period, October 28, 1992—December 31, 1992, and concomitant use of total record sales for the claimant during this same period, *Id.* at 7-8; (6) failure to include record club sales and/or computer sales in the calculations for total record sales, *Id.* at 8; and (7) failure on the part of certain Settling Parties to fulfill their fiduciary obligations toward their members. *Id.* at 9-10.

Whereas Ms. Evelyn's petition stated her concerns with certain particularity, Mr. Curry's petition to set aside the panel's determination rests primarily on a fundamental assertion that the Settling Parties never proved their case. Petition to Set Aside the Determination of the Arbitration Royalty Panel, submitted by Eugene Curry (Curry Petition), at 1. Mr. Curry argues that he had to submit specific titles of his works and documentation of record sales whereas the Settling Parties produced no hard numbers for the record sales of any claimant represented by the Settling Parties. *Id.* at 2,3,4. Curry further argues that it was error for Ms. Smith<sup>5</sup> to

<sup>4</sup>Mr. Fine is the Chief Executive Officer of SoundScan, Inc. Witness Affidavit, Settling Parties' Direct Case.

<sup>5</sup>Ms. Smith is Vice President of Performing Rights of Broadcast Music, Inc. Witness Affidavit, Settling Parties' Direct Case.

supply Mr. Fine with authorship data and not present any data on the number of disseminations of his works through transmissions, i.e. radio play. *Id.* at 2, implying that the Panel failed to properly apply the statutory criteria for making its determination. Additionally, Mr. Curry submits that he supplied the Settling Parties with documentation of record club sales in support of his argument that SoundScan was not the only source of record sales data, nor the best source, but this information was not utilized in the final report to adjust the sales figures. *Id.* at 4.

In reply, the Settling Parties request that the Librarian deny Ms. Evelyn's and Mr. Curry's petitions on both procedural and substantive grounds. The Settling Parties contend that the Panel's report was not arbitrary or contrary to the law, when analyzed under the applicable standard of review, and therefore, should be adopted as filed by the Librarian. Furthermore, the Settling Parties oppose the Evelyn and Curry petitions because each petition failed to reference applicable sections of the party's proposed findings of fact and conclusions of law. See 37 CFR 251.55(a).

#### *Sufficiency of Ms. Evelyn's and Mr. Curry's Petitions To Modify*

Before the Register can address the issues raised by Ms. Evelyn's and Mr. Curry's petitions to modify the determination of the Panel, the Register must first address the contention raised by the Settling Parties that the petitions must be dismissed for failure to comply with section 251.55(a) of the CARP rules. That section provides that each petition must "state the reasons for modification or reversal of the panel's determination, and shall include applicable sections of the party's proposed findings of fact and conclusions of law." 37 CFR 251.55(a).

Review of Ms. Evelyn's and Mr. Curry's petitions reveals that neither comply with the second part of the rule which requires identification of applicable portions of a petitioner's proposed findings of fact and conclusions of law. The purpose of this requirement is to enable the Register, and the Librarian, to locate those portions of the testimony that support each party's petition. However, absent a showing of bad faith, the remedy for failure to comply with the requirement is not dismissal of a party's petition to modify. Rather, the remedy is for the Register to direct the offending party to amend his or her petition to include identification of the applicable portions of their proposed findings of fact and conclusions of law. This approach,

however, is not necessary in this proceeding because the record is relatively small. Therefore, Ms. Evelyn's and Mr. Curry's petitions to modify were accepted.

#### *Review of the CARP Report*

In reviewing the determination of a CARP, the Register is required to confine her consideration to the record of the proceeding. 17 U.S.C. 802(f). The record in this proceeding consists solely of the written direct cases of the Settling Parties, Ms. Evelyn, and Mr. Curry. Consequently, despite the protestations of Ms. Evelyn and Mr. Curry, the Register will not address issues raised in their petitions to modify which go beyond the evidence presented in the written direct cases.

The Register's review is in three parts: (1) An analysis of the statutory criteria to be used in the current proceeding; (2) an analysis of the methodology adopted by the Panel to implement the statutory criteria; and (3) an analysis of the application of the adopted methodology to the record evidence.

1. *Statutory criteria.* The Audio Home Recording Act of 1992 clearly delineates the statutory criteria to be considered when making a distribution of DART royalties. Specifically, a CARP may only consider "the extent to which, during the relevant period \* \* \* each musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions." 17 U.S.C. 1006(c)(2). While a CARP is limited to these two statutory criteria in determining a DART royalty distribution, the statute does not require the application of both criteria. Thus, in circumstances where the parties to a DART distribution have presented evidence as to only one of the criteria, there is no requirement that a CARP request evidence as to the second criteria as well.

In this proceeding, the parties presented credible evidence only as to the distribution criteria (record sales).<sup>6</sup> The Register concludes that the Panel acted properly in basing its determination solely on the evidence of record sales, and was not required to take record evidence as to the dissemination of musical works in transmissions when no such evidence was submitted by the parties. Further, the Register determines that the Panel

acted properly by refusing to consider evidence presented by Ms. Evelyn and Mr. Curry that was not relevant to the section 1006(c)(2) criteria. See, CARP Report, para. 52.

2. *Methodology.* The Settling Parties presented the only systematic method for determining the distribution of the royalties in the Musical Works Funds. The formula divided the total song title sales credited to a claimant during a particular year by the total song titles sold during the same year. This calculation determines the claimant's proportionate share of the royalties for that period of time. The Panel found this formulation acceptable for making its determination because it allows each claimant to receive credit for actual sales during the relevant period. CARP Report, para. 54. Additionally, the Panel noted that Ms. Evelyn and Mr. Curry failed to propose any alternative systematic method or formula for calculating a claimant's share of the royalties. CARP Report, paras. 40 and 48.

Although neither Ms. Evelyn nor Mr. Curry challenge the Settling Parties' formula for determining each claimant's share of the royalties, Mr. Curry does challenge application of the formula solely to himself and Ms. Evelyn,—that is, not the Settling Parties. The Register concludes that the Panel did not act arbitrarily by using the formula to determine Mr. Curry's and Ms. Evelyn's proportionate share of the royalties from actual sales data. First, the Panel found that the Settling Parties represent all claims except those of Mr. Curry and Ms. Evelyn. CARP Report, paras. 36 and 37. Second, based on this finding and application of the simple mathematical concept that the sum of the parts must equal the whole, the Panel accepted the presentation of evidence for the two individual claimants' share of the royalties and deducted this sum from 100% to determine the Settling Parties' share of the royalties. CARP Report, para. 69. Such an approach is logical and consistent and was fully within the discretion of the Panel.

Ms. Evelyn raises a second challenge to the methodology utilized by the Panel. Specifically, she challenges the fact that the Panel considered the total sales figures for 1992, rather than only those sales which occurred during the time period that the Audio Home Recording Act was in effect (October 28, 1992 to December 31, 1992). The Register determines that this challenge is not fatal to the Panel's action. First, Ms. Evelyn did not file a claim to DART royalties for 1992, and her distribution is not affected by the Panel's determination for 1992. Second, there is

no evidence in the record that suggests that the Panel could have ascertained the universe of record sales, and the sales of Mr. Curry, for the period from October 28, 1992, through December 31, 1992. Nevertheless, the Panel determined Mr. Curry's percentage claim from the annual sales data under an apparent assumption that record sales occurred at the same rate throughout 1992. A careful review of the record reveals no evidence suggesting that the rate of record sales during the effective period of the Audio Home Recording Act was statistically different from the rate of sales throughout the remainder of the calendar year. Consequently, the Register finds the Panel's use of the annual sales figures not arbitrary, although evidence of record sales from this period would have provided the ideal precision for application of the formula. See, *National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 379 n.10 (D.C. Cir. 1982) (Tribunal's findings acceptable "though of less than ideal clarity," so long as "the path which the agency follows can reasonably be discerned.").

3. *Application of Methodology to Record Evidence.* The Register finds that the Panel did act arbitrarily in determining Mr. Curry's<sup>7</sup> share of the 1992, 1993, and 1994 Publishers Subfunds. The Panel erred by determining that Mr. Curry, as writer, and Mr. Curry, as publisher, were to receive the same award.

In determining Mr. Curry's record sales for the Writers Subfunds, the Panel prorated his sales based on his percentage contribution as author to each musical work. For example, the Panel accorded Mr. Curry credit for one-half, 50%, of the total record sales for the musical work "Burnin'" because he was the co-author of the work. CARP Report, para. 34. While this approach is appropriate in determining Mr. Curry's share of the Writers Subfunds, it is contrary to the evidence in determining his share of the Publishers Subfunds. There is no evidence in the record which demonstrates that Mr. Curry was entitled to anything less than a one hundred percent publishing interest from the sales of the musical works credited to him by the Panel for the Publishers Subfunds. The Register is, therefore, recommending that Mr. Curry's award for the 1992-1994 Publishers Subfunds be adjusted to reflect a one hundred percent

<sup>6</sup> The Panel found that while the Settling Parties and Mr. Curry did not present any evidence of performances, the evidence presented by Ms. Evelyn as to performances of her works was not competent. Report, paras. 46-47. After reviewing the record, the Register concludes that this determination by the Panel was not arbitrary.

<sup>7</sup> In his capacity as sole representative of Tajal Music, Inc., Mr. Curry filed claims to the 1992, 1993, and 1994 Publishers Subfunds



publishing interest for Mr. Curry as sole representative of Tajai.

One final point raised by Mr. Curry and Ms. Evelyn concerns the use of SoundScan as the definitive source of record sales data. The Report, however, clearly indicates that the Panel did consider evidence submitted by Mr. Curry regarding sales through record companies, and that after due consideration, the Panel rejected the evidence because he failed to provide the universe of record sales for these companies during the relevant time. CARP Report, para. 40. The Panel's decision to reject the record sales data submitted by Mr. Curry and rely upon the SoundScan data was not arbitrary.

Similarly, Ms. Evelyn's contention that the Settling Parties failed to provide

additional data concerning additional DART eligible songs is without merit. The Panel carefully analyzed her direct case and found no credible evidence of sales or performances in the U.S. during the relevant period, CARP Report, paras. 41-48; the Panel did credit her with sales of musical works introduced by the Settling Parties. CARP Report, para. 35. Furthermore, the Register notes that the evidence presented by the Settling Parties, and adopted by the Panel, for record sales of Ms. Evelyn and Mr. Curry credit them both with greater sales than the evidence they presented in their written direct cases, thereby increasing the size of their respective awards. CARP Report, para. 62 and 64.

As discussed earlier in this Order, the Librarian's scope of review is very

narrow. The limited scope certainly does not extend to reconsideration of the relative weight to be accorded particular evidence, and the Librarian cannot second guess a CARP's balance and consideration of the evidence, unless it runs counter to the evidence presented to it. *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983).

#### Conclusion

For the above stated reasons, the Register recommends that the following should be the percentages for the distribution of the royalties in the 1992, 1993, and 1994 Musical Works Funds:

	1992		1993		1994	
	Writers	Publishers	Writers	Publishers	Writers	Publishers
Curry .....	00.007096	00.014745	00.001608	00.003802	00.003398	00.007066
Evelyn .....	NA	NA	00.000084	NA	00.000082	NA
Settling Parties .....	99.992904	99.985255	99.998308	99.996198	99.99652	99.992934
Total .....	100.00	100.00	100.00	100.00	100.00	100.00

#### II. Order of the Librarian of Congress

Having duly considered the recommendation of the Register of Copyrights regarding the report of the Copyright Arbitration Royalty Panel in the distribution of the 1992-1994 Musical Works Funds, the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing an order setting the distribution of the royalties in the 1992-1994 Musical Works Funds.

Wherefore, it is ordered that the royalties in the 1992-1994 Musical Works Funds shall be distributed according to the following percentages:

	1992		1993		1994	
	Writers	Publishers	Writers	Publishers	Writers	Publishers
Curry .....	00.007096	00.014745	00.001608	00.003802	00.003398	00.007066
Evelyn .....	NA	NA	00.000084	NA	00.000082	NA
Settling Parties .....	99.992904	99.985255	99.998308	99.996198	99.99652	99.992934
Total .....	100.00	100.00	100.00	100.00	100.00	100.00

As provided in 17 U.S.C. 802(g), the period for appealing this Order to the United States Court of Appeals for the District of Columbia is 30 days from the effective date of this Order.

Dated: February 3, 1997.

Marybeth Peters.

Register of Copyrights.

Approved by:

James H. Billington.

The Librarian of Congress.

[FR Doc 97-3316 Filed 2-11-97; 8:45 am]

BILLING CODE 1410-33-P

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (97-013)]

#### Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of availability of inventions for licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

Copies of patent applications cited are available from the Office of Patent Counsel, Goddard Space Flight Center. Claims are deleted from the patent applications to avoid premature disclosure.

DATES: February 12, 1997.

FOR FURTHER INFORMATION CONTACT: Guy M. Miller, Patent Counsel, Goddard Space Flight Center, Mail Code 204, Greenbelt, MD 20771; telephone (301) 286-7351.

NASA Case No. GSC-13,524-2: A Dual Amplitude and Dual-Time-of-Flight Ultrasonic Imaging System;

NASA Case No. GSC-13,681-1: Low Cost GPS Receiver;

NASA Case No. GSC-13,708-1: Segmented Cold Cathode Display Panel;

FILE COPY

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANDATE

2, 17, 99

E. Brown

No. 97-1119

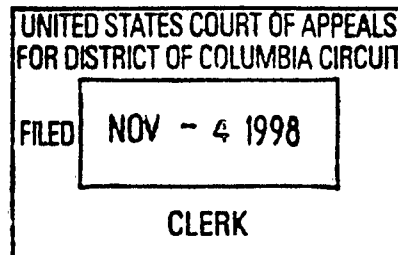
September Term, 1998

Order on Costs

Eugene Curry,  
Petitioner

v.

Librarian of Congress and Register of Copyrights,  
Respondents



Broadcast Music, Inc., et al.,  
Intervenors

Consolidated with 97-1136, 97-1143

ON PETITION FOR REVIEW OF AN ORDER  
OF THE LIBRARIAN OF CONGRESS

BEFORE: Silberman, Henderson, and Tatel, Circuit Judges

J U D G M E N T

These consolidated petitions for review of the orders of the Librarian of Congress, filed May 9, 1996 and February 12, 1997, were considered on the briefs and the appendices filed by the parties. The court has determined that the issues presented occasion no need for an opinion. See D.C. Cir. Rule 36(b). It is

**ORDERED AND ADJUDGED** that the petitions for review, insofar as they are against the Registrar of Copyrights, be dismissed. See National Ass'n of Broadcasters v. Librarian of Congress, 146 F.3d 907, 923 (1998) (17 U.S.C. § 802(g) limits court's review to Librarian's decisions). It is

**FURTHER ORDERED AND ADJUDGED** that the petitions for review against the Librarian of Congress be denied. See National Ass'n of Broadcasters, 146 F.3d at 918, 924 (noting exceptionally deferential standard of review; award will be upheld if Librarian offers facially plausible explanation bearing rational relationship to record evidence). The court finds nothing in petitioners' claims warranting modification or remand of the Librarian's orders on review.

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1119

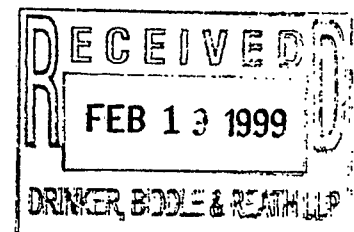
September Term, 1998

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

*JWS*  
KLH

*117*



# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1119

September Term, 1998

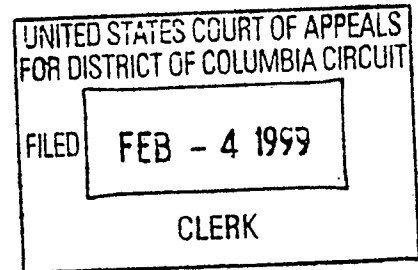
Eugene Curry,  
Petitioner

v.

Librarian of Congress and Register of Copyrights,  
Respondents

Broadcast Music, Inc., et al.,  
Intervenors

Consolidated with 97-1136, 97-1143



BEFORE:

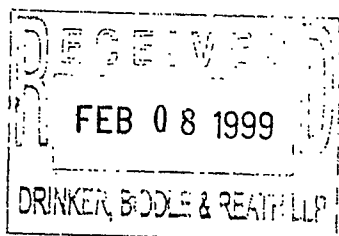
Edwards, Chief Judge; Wald, Silberman, Williams,  
Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel  
and Garland, Circuit Judges

## ORDER

Upon consideration of the Petitions for Rehearing En Banc of petitioners Evelyn and Cannings, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

Per Curiam



FOR THE COURT:  
Mark J. Langer, Clerk

BY: *Robert A. Bonner*  
Robert A. Bonner  
Deputy Clerk

FILE COPY

SUPREME COURT OF THE UNITED STATES  
OFFICE OF THE CLERK  
WASHINGTON, D. C. 20543

June 24, 1999

Mr. Michael J. Remington  
Drinker Biddle & Reath  
1500 K Street, N.W., Ste. 1100  
Washington, DC 20005

Re: James Cannings  
v. Librarian of Congress, et al.  
No. 98-1814

Dear Mr. Remington:

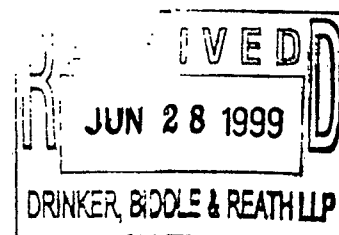
The Court today entered the following order in the above  
entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

*William K. Suter*

William K. Suter, Clerk



SUPREME COURT OF THE UNITED STATES  
OFFICE OF THE CLERK  
WASHINGTON, D. C. 20543

ORIGINAL

August 23, 1999

Mr. Michael J. Remington  
Drinker Biddle & Reath  
1500 K Street, N.W., Ste. 1100  
Washington, DC 20005

Re: James Cannings  
v. Librarian of Congress, et al.  
No. 98-1814

Dear Mr. Remington:

The Court today entered the following order in the above  
entitled case:

The petition for rehearing is denied.

Sincerely,

*William K. Suter*

William K. Suter, Clerk

